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THE
TOUCHSTONE
OF
Comon Assurances.

OR,
A Plain and Familiar TREATISE,
opening the Learning of the Common
Assurances or Conveyances of the
KINGDOM.

BY
WILLIAM SHEPPARD, Esq.
Sometimes of the Middle Temple.

LONDON,
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WILLIAM H. H. H. H.

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TO THE RIGHT
VV O R S H I P F U L L
the *Benchers* of the *Middle Temple*,
and to the rest of the *Gentlemen* of
that SOCIETY.

GENTLEMEN,



May perhaps have been so long out of your sight that I may be also by this time out of your minde. Nevertheless, it is not out of my mind, that I having received the seed and growth of that little knowledg in the laws of this kingdome which God hath given me in the seed-plot of your ancient and honorable Society, doe no less (by a naturall equity) owe the fruit thereof to you, then the Rivers do their tribute to the Ocean, and the trees their fruit to the Planters and Pruners. This therefore (such as it is) although unworthy of so great a name, I am bold to dedicate to you, and put forth under the shelter of your favourable wings; beseeching you to accept thereof, and my well meaning therein, and to honor it with your patronage and countenance And it shall much oblige.

(*Gentlemen,*)

Your most humble Servant

W. S.

TO THE RIGHT
 VV. O. R. E. H. P. T. I. D. E.
 the Bishops of the Middle Temple
 and Masters of the Court of
 the SOCIETY.

CERTIFICATE

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the above-named Society, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
 Your obedient servant,
 J. H. [Signature]

(Continued)

Your obedient servant

IN 31

TO THE READER.



Ourteous Reader, I doe desire in all plainness to be understood, that having in the time of my study of the Lawes of this Realme, collected some confused Notes and Observations out of the same: And being afterwards willing (for God knowes I had no further end or aim at first in them) for mine owne private help and better readines, to digest them into some order and method, such as my understanding could best contrive. The which things thus prepared and lying by me, came by chance to the view of some more learned then my self, who seemed to give some good approbation thereunto. Whereupon, I first of all began to bethinke my selfe of making some part thereof publick. And having to that purpose advised with some of my more judicious friends, and being encouraged by some, and not discouraged by others, I did at last resolve to attempt to publish and put in print the same. And calling to mind that the Common Assurances and Conveyances of the Kingdome (being that whereupon the whole estates, and consequently the livelihoods of very many depend) are matters of great importance and that concern most men; and that therefore the legal learning thereof must needs be of great and daily use. And considering withall the mischief arising every where by the rash adventures of sundry ignorant men that meddle so much in these weighty matters, there being now almost in every parish an unlearned, and yet confident pragmaticall Attorney (not that I thinke them all to be such) or a lawless Scrivener, that may perhaps have some Law Books in their houses, but never read more Law then is on the backside of *Littleton*, or an ignorant Vicar, or it may be a Blacksmith, Carpenter, or

To the Reader.

Weaver, that have no more Bookes of Law in their houses, then they have Law in their heads, and yet as apt and able (if you will beleve themselves) either to judge of a Conveyance, and by the rules of Law (of all which they are utterly ignorant) to determine of the strength and goodness of a title or estate already made, or to make a Conveyance to transerre the property of things from man to man, as the most learned and best Counsellor of them all ; and therefore undertake with great confidence, and dispatch without any scruple any business whatsoever offered to their hands: wherein they deal with men in their estates, as many that are called Physitians (but in truth Empericks) deal with men in their bodies (an evill fit for the consideration of a Parliament) How they come to this their supposed dexterity and skil is a wonder, except that saying be false, *Nemo nascitur artifex*. Either it must be born with them, or they must have it by education, or they must not have it at all. But if they will tell me they have good presidents, I will tell them that a good Conveyancer must be as well able to judge of the validity of the title, and primitive estate of him that is to convey (which a man can never do without knowledge of the rules of Law, no more then a blind man can judge of colours) as to make a derivative estate and conveyance by a good president ; for *scire est per causas scire*, as the Philosopher speaks. And as well for ought I know, may a man be an able Physitian by certain medicines only, that never read so much as the grounds of Physick, as such men be able Conveyancers by their Presidents onely, that never read so much as the maxims of Law : *Nullum medicamentum idem est in omnibus*. For my part I must ingenuously profess that I can scarce look into a title or meddle with a conveyance of weight, wherein I cannot make and move more doubts & questions, then I am able to resolve and answer ; and therefore these men have gotten the start of me much. And yet (much marvel it is to see) how these Empericks of the Law (if I may so call them) are sought unto and made use of, & that not onely in lesser, but oft-times in greater and more weighty businesses, & that without the assistance of any others more able & sufficient, the which is not for lack of opportunity of finding more learned men in the Law, for there

To the Reader.

is a sufficient store of them in all places : nor doe those that employ these Empericks of the Law always save (if they thiak it saved) mony hereby, for besides the great mischief which is oft-times done by themselves by the unskilfulness of these workmen, some of them by reason of their much custome are grown more chargeable then an ordinary Connseller, whose fee is certain and known. But of these Empericks of the Law and those that make use of them, I might say as sometimes our blessed Saviour said, *Let them alone, the blind leaders of the blind.* Howbeit being said, (as I conceive) hereunto, I chuse rather to admonish them and to tell the first sort, That I conceive them to be usurpers upon, and intruders into other mens callings, and that they thrust their sickles into other mens harvest, & that they have not yet learned that rule of Divinity, *To abide in the calling wherein they are called*, but exercise themselves in things too high for them; nor yet have they learned this, *Ne sutor ultracrepidam*, Let not the Cobler go beyond his last; nor have they learned that, *In quo quisque norit in hoc se exerceat*. And let me tel the latter sort, That they heed not enough this saying, *Caveat Emptor*; nor beleieve that saying, *Cuiusque in arte sua credendum*, that every man is to be beleaved in his own art. But if you will say to me, That these men do their work well, and their work doth succeed well: I will say to you, that the blinde man may happily hit the mark, and it may fall out that sometimes they do their work well, and it doth succeed well, but oft-times woful experience sheweth the contrary, and that many men have been much mischieved every where by the ignorance of these men. Wherefore I wish both sorts of them to doubt more and to be well advised in these affairs, as the Law doth presume every one will be; for therefore is it in deed that a Will hath a more favourable interpretation then a Deed, because mens Wils are oft-times made in hast, and it is presumed men take who they can to make them; but men for the making of their Deeds are not put upon those straits, but they take advise of learned men therein. And the more to move men herein and to redress the evil before discovered, I have herein set forth under certain general Titles or Common Places, the greatest part of the Judgements, Statutes, Resolutions, and Cases

To the Reader.

ses, that do contain or concern the learning of the Common Assurances of the Kingdome, so as I think I may truly say, under reformation, that there are few material things as touching this subject to be found any where dispersed in the Volumes of the Law, but they are to be found somewhere herein, and that there shall not happen one Case of a hundred but a hundred to one the diligent Reader may here find the Case it self, or some Case that by good inference may be applied to it. Not that I would have men now to rely upon this help, and be less careful and more careless to take advice of the Lawyer then heretofore (for this is the disease I labour to cure,) for howbeit may be that hereby these matters are made in some measure conspicuous, yet to say the very truth, besides that the subject matter of Law is somewhat transcendent, and too high for ordinary capacities, the manner of putting of Cases is so concise, the distinctions and differences of Law are so many, that it is hard for any man not well read in the Laws in general, to judge or make use of any part of them in particular, and rightly and fully to apprehend and apply the things herein set forth: and therefore I dare not advise men to rest altogether hereupon, nor can I forbear to tell them it is very dangerous so to doe. But my aim and ends being also the uses and commodities I expect and look after from this work, is first of all, that such men as have spoken of, may see by the view of the infinite variety of Cases, Points, and Questions, as touching these matters, discovering also so many by-ways wherein men conversant therein may walk, how much there goes to making up of an able Conveyancer, and that it is not so easie a matter to judge of a Title, give advice upon a Conveyance, and make these Common Assurances as men dream of, and that therefore men learn more to suspect themselves and others herein, and to these it may serve as a light in a dark place. Secondly, that by this the Lawyer and Student may in some measure readily find together what he desires touching these matters; and to him it may serve for a Table or Remembrancer. And lastly, that every man may be the better able by the help thereof to understand, open & put his own case to his Lawyer, & to move more pertinent questions to him: & other uses I would have no man to make
of

To the Reader.

of it. In the use of this work therefore I must give thee two Advertisements or Caveats. First, that if thou desire to find any thing in particular therein contained, that thou read the whole Chapter, or at least the whole Question and Division of the Chapter wherein that thing is contained. And secondly, that thou doest not confidently build and rely upon any thing therein alone without advice from the learned Lawyer also, or at the least without a serious and judicious perusall of the Authorities and Books themselves to which thou art therein referred: *Melius est petere fontes quam sectari rivulos.* Some other things there are also herein inserted, as falling aptly under the Title, albeit it be not altogether pertinent to the subject matter. And all these sweet flowers of the Law growing *sparsim* in the great fields of the Volumes of the Common and Statute Lawes, have I thus painfully gathered, bound up and commended to thy charitable censure: no doubt but in my desire to grasp and take up so much, I have taken and bound up some grasse withall, which I hope shall not offend. If so bee that I find it have a fragrant smell with thee, I shall think I have recompense enough for my pains. But if any man think me too presumptuous to attempt this enterprise, let him know first, that there is nothing mine in it, but the method, (and that not mine neither altogether) the matter thereof being nothing else but the Judgements, Resolutions, and Opinions of the Judges of the Law in succeeding times: and then as I have not trusted my self, so they shall not trust me altogether in these things. For I doe freely acknowledge mine own weakness and want of judgement, and that I am the unmeetest and unworthiest of all men to undertake such a worke, not one of a thousand, but the meanest of ten thousand. And this I have done is a poor something sufficient only to give them that are more learned occasion to do something more exactly in this kind. If any man dislike the publishing of it in the English tongue, and think perhaps it may make the Law, to be the more despised, and the Practitioner of the Law the less regarded and used, I do wonder at the dislike of such a man: for to me there appears no more reason why to keep the Lawes in an unknown language that they may be kept from the knowledge of the people, then

Papists

To the Reader.

Papists have to keep the Scriptures and their prayers in a language unknown to the people, these being the Laws by which the people are to be governed, and the Law being the best inheritance of the Subject. The wisdom of the Parliament hath thought to commend all the Statute Laws to the people in English, and to appoint that the pleadings should be in English. And have we not many Books of Law in English already, as *Littletons Tenures*, *Doctour & Student*, *Finches Law*, *Justice Dodridge Treatises*, *Coke upon Littleton*, the *Womans Lawyer*, and many others? and are not these usefull and profitable? And besides the greatest part of the proceedings in Chancery (the Court of greatest imployment within the Kingdome) are in English. And if it be meet any part of the Law be in the native tongue, it should seem it is meet this part should be so, because it concerneth so many men, and them also so much, that they may see and understand somewhat in their own Evidences. And therefore as we have turned their Deeds from Latine to English, so let us also turn some of the Law touching these Deeds out of French into English. *Bonum quo communius eo melius*. And I see no more reason why in Law more then in Physick the discovery of the Art should make the Art or Artists the lesse regarded. But (under correction) I should rather think that it will rather make them both the more esteemed as a jewell whose properties are known, and that it will make them the more, and other men we have before spoken of the lesse to be used and employed in their affairs, for the more men know, the lesse they think they know, and the more they doubt, and nothing moves men to be so bold & confident in these matters as their ignorance, according to the Proverb, *Who so bold as blind bayard*? And for further answer to this, I wish men to see the Preface of the Lord *Coke upon Littleton*. And if any man have any thing else to object and except for some there are that wil neither put forth their own strength to do good, nor bear with others that do so) I wish them to undertake the same subject, and to perfect and supply my defects. And so committing thee to God, and this work to thy favourable censure, I am

Thy true friend,
W. S.

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THE



THE
TOUCHSTONE
OF
Common Assurances.

CHAP. I.

Of Common Assurances in general.

THe Common or General Assurances or Conveyances of the Kingdome (being that by which commonly the property of things is made or changed) are of two sorts, or are made two manner of waies; viz. either by matter of Record, or by matter of Deed. Those that are made by matter of Record also are made either by matter of Record of a more high nature and extraordinary way, or by matter of Record of a more low nature and ordinary way. Those assurances that are made by matter of Record of a more high nature, are such as are made by Act of Parliament, of which we intend not to treat at all, neither doe we intend to meddle with those Assurances that are made by the King unto his Subjects, as being matters more transcendent and intricate; but those we intend to treat of, are onely the common Assurances or Conveyances that are made between Subject and Subject, and are of ordinary and daily use for the transferring of the property of lands, tenements and hereditaments from one man to another. And of these there are observed to be ten kinds, two whereof are made by matter of Record, as a Fine, which is said to be a Feoffment of Record; and a common recovery, which is in the nature also of a Feoffment of Record: and the rest are by matter of Deed; as First, by feoffment. Secondly, by Grant. Thirdly, by Bargain and Sale by deed indented and inrolled. Fourthly by Lease. Fifthly, by Exchange. Sixthly, by Surrender. Seventhly, by

Release or Confirmation, both which are in nature of Grants. Eightly, by Devise, or by last Will and Testament. And some of these also serve to transferre the property of other things as well as of lands, and some of them also have other operations and uses, as well as to change and alter property and pass things from one man to another, as will appear in their proper places. And the first thing we shall begin upon shall be the learning of a Fine and Common Recovery, and first of a Fine.

CHAP. II.

Of a Fine.

Fine, *quid*.

THis word is ambiguously taken in our Law, for sometimes it is taken for a summe of money or mulct imposed or laid upon an offender for some offence done, and then also it is called a ranfome. And sometimes it is taken for an Income or a summe of money paid at the entrance of a tenant into his land: and sometimes it is taken for a small agreement or conveyance upon Record for the settling and securing of lands and tenements. And in this sense it is taken here; and so it is defined by some to be, An acknowledgement in the Kings Court of the land or other thing to be his right that doth complain. And by others, A Covenant made between parties, and recorded by the Justices. And by others, A friendly, reall and small agreement amongst parties concerning any land or rent or other thing whereof any suit or writ is hanging between them in any Court. And by others more fully, An instrument of Record of an agreement concerning lands, tenements or hereditaments, duly made by the Kings license, and knowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the Justices of the Common Pleas or others thereunto authorised, and ingrossed on Record in the same Court, to end all controversies thereof, both between themselves which be parties and privie to the same, and all strangers not suing or claiming in due time. And in every Fine there is a suit supposed, wherein the party that is to have the thing is called the Plaintiff, and sometimes also in another respect the Conussee or Recognisee, and the other that doth depart with the thing is called the Deforçant, and sometimes in another respect the Conusor or Recognisor. And it is therefore said to be *Finalis concordia, quia finē ponit negotio adeo ut neutra pars litigantium ab eo de cetero possit recedere*. And it was anciently the end of a suit indeed; for after there had been some contention about the thing by suit, the parties became agreed who should have it, and so a fine was levyed of it, and the e was an end of the matter; and hence it is said to be *fructus* or *effectus legis*, because

Termes of
the law,
tit. Fine
Co. upon
Lit. 126,
127, 120.
Plow. 357
West.
Symb. par.
2 chap. 1.

Conussee or
Recognisee.
Conusor or
Recognisor.
Deforçant.

because it gives a man the fruit or effect of his suit. And to this day therefore a writ doth always go forth before a fine can be levied, and this is now one of the common Assurances of the Kingdom.

20. s. 38.
43 Stat.
5 H. 4. ch.
34.

There are five essentiall parts of a Fine. First, the original writ taken out against the Conusor, for without this a fine cannot be levied. Secondly, the Kings license for the levying of the fine, and for this the King is to have a fine or summe of money, which is called Kings silver, for this is properly that money which is due to the King, in the Court of Common Pleas, in respect of a license there granted to any man for passing a fine. And this is part of the revenues of the Crown. Thirdly, the Conusance or Concord it self, which is the very agreement between the parties that intend the levying of the fine, how and in what manner the thing shall pass, and doth begin thus; *Est Concordia talis, &c.* And this is the foundation or substance of the fine; for if upon this the Kings silver be entred, albeit the Conusor die afterwards, yet the fine is good, and the note or foot of the fine are but abstracts out of this. Fourthly, the note of the fine, which is an abstract of the originall Contract or Concord, and doth beginne thus. *Inter A. querentem & B. & C. deservientes, &c.* Fifthly, the foot of the fine, which doth begin thus. *Hac est finalis Concordia, &c.* and containeth all the matter, the day, yeare, and place, and before what Justices it was levied, which is therefore called the foot of the fine, because it is the last part of it, and when this is done all is done. And of this there are Indentures made by the Chirographer, and delivered to the party to whom the Conusance is made, which is called the ingrossing of a fine, for then a fine is said to be ingrossed when the Chirographer makes the indentures of the fine, and doth deliver them to the party to whom the Conusance is made.

The parts of it.

Kings silver.
Quid.

Concord.
Quid.

Note of the Fine.
Quid.

Foot of the Fine.
Quid.

F. N. B.
247. a.
Co. 5. 39.

Ingrossing of the Fine.
Quid.

West.
Symb.
part 2 Sect
19. Dyer.
216.
Plowd.
265. Stat.
4 H. 7.
chap. 24.
1 R. 3. ch.
7. Co. 3.
86. Stat.
31 H. 8.
chap. 36.

A Fine is either without Proclamations, which is also called a fine at the common law, and this is such a fine as is levied after such manner and form as fines were usually levied before 4 H. 7. upon which no Proclamations were made, which fine doth still remain of the same force as it was at the common law, to discontinue the estate of the Cognisor if it be executed. Or it is with Proclamations, which is also called a fine according to the Statute, and which is such a fine as is levied with Proclamations after the form and manner ordained by the Statute of 4 H. 7. c. 24. (and such a fine shall every fine that is pleaded intended to be if it be not shewed what fine it is) and of this sort were and are most fines since 4 H. 7. as being the best kinde of fine of all; and it is in the election of him that sueth out the fine as long as hee liveth to have it with, or without Proclamations. A fine also whether with or without Proclamations, is either executed, which is such a fine as of his own force giveth a present possession (or at the least in Law) unto the Cognisee, so

Quotuplex.

that he needeth no writ of *Habere facias seisinam* or other means for the execution thereof; but he may enter: of which sort is a fine *sur cognisance de droit come ceo que il ad de son done*, which is in very deed the best and surest kind of fine of all, and is thus, *Et est concordia talis, scilicet quod predicti A. recognoverit tenementa predicti cum pertinen esse jus ipsius B. ut illi que idem B. habet de dono predicti A. & illi remisit, &c.* And this kind of fine doth alwaies suppose a feoffment, or gift precedent of the same thing whereof the fine is had, which the fine is to corroborate and strengthen. Or it is executory, which is such a fine as of his own force doth not execute the possession in the cognisee, and of this sort is a fine *sur cognisance de droit tantum*, when the party that doth levy the fine is seised of the thing, and he to whom the fine is levied hath no freehold therein but it passeth by the fine: and a fine *Sur Done, Grant, Release, ou Confirmation*, which is after this manner. *Et est concordia talis, sc. quod predicti A. concessit et reddidit tenementa predicta cum pertin prafat B. et heres suis durante vita ipsius A. Et predicti A. warrant prae cum pertin prafat B. & heres suis tota vita ipsius A.* Or thus, *Et est, &c. quod prae A. concessit prae B. tenementa, &c. Habena eidem B. pro termino vite sue.* Or thus, *Et est, &c. quod prae A. recognoverit tenementa predicti cum pertinen esse jus ipsius B. & ille ei reddidit in eadem curia habena &c.* Or a fine *Sur Done, ou Grant et Render*. Which is thus, *Et est concordia talis, sc. quod predicti A. recognoverit, &c. ut illi qua idem B. habet de dono predicti A. et illi remisit, &c. Et pro hac predicti B. concessit tenementa predicti cum pertinen prafat A. Et illi ei reddidit in eadem Curia habendum et tenena, &c.* And if these kind of fines be not levied, or such Render made unto them that be in possession at the time of the fines levied, the Cognisees must enter or have writs of *Habere facias seisinam*, according to their several Cases for the obtaining of their possessions. But if at the time of levying of such an executory fine the party unto whom the estate is limited be in possession of the lands passed, he shall not need any writ of execution to put him in possession: for then the fine will enure by way of extinguishment of right, and doth not alter the estate or possession of the Cognisee, however perchance it doth better it. The fine *sur cognisance de droit tantum* also doth serve sometimes to make a surrender, and then it is therein recited that the Conusor hath an estate for life, and the Conusee the reversion: and sometimes it doth serve to grant a reversion, and then the particular estate is recited to be in another, and that the Conusor willeth that the other shall have the reversion, or that the land shall remain to the other, after the particular estate spent: a fine also is either single, which is such a fine by which an estate is granted to the Cognisee, and nothing granted or rendred back again to the Conusor by the Cognisee. Or it is double, which is such a fine as doth contain a grant and render back again either of the land

Co. 7. 32.

Vide infra.

it self, or of some rent, common or other thing out of it to the Cognisor for some estate, limiting thereby many times remainders to strangers which be not named in the writ of covenant, which also is sometimes with reservation of rent, clause of distress, and grant of the same over.

The manner and order of suing out or levying of a fine is thus. First, there is an original writ sued out, and this may be a writ of *Mofne, Warrantia charta, de consuetudinibus et servitiis*, or any writ of right (for upon these or any other writ whereby land is demanded or may be recovered, a fine may be levied) but the most usual writ whereupon a fine is levied is a writ of covenant. And whiles this writ is depending, for howsoever it be the common practice to take out a *Dedimus potestatem*, and have the consufance of a fine before any original writ be sued forth, yet the original writ is alwaies supposed in law to precede the *Dedimus potestatem*, and therefore doth and must evermore bear *Teffe* before it, or else it is erroneous. After the original writ sued forth, there is a *Precipe*, which is the tituling of the writ whereupon the fine is levied, and the concord and agreement of the parties, both which are fairely written (and that most commonly in parchment :) after this, the party or parties that is or are to knowledge and levy the fine, is or are to come in person before him or them that have power to take the same consufance; who are to take notice of the persons, that if there be any woman that hath a husband amongst the consufors in the fine, they doe examine her whether she be willing and doe it freely without compulfion of her husband. After this, all the parties that are to levy the fine are to declare themselves before the Judges or Commissioners (having power to take the same consufance) to be willing to pass their right in the lands according to the agreement, and to subscribe their names or markes to the concord : and if it be taken by a speciall *Dedimus potestatem*, it is to be returned and certified under the hands and Seales of the Commissioners into the Court of Common Pleas, that it may be there recorded and finished. And there the Party Conufee is first to compound with the King for his license, for which he is to pay the Kings silver, and thereof he is to have an entry on the back of his writ of Covenant, and then he is to have it rolled by the *Custos breviarum*, and upon this roll the Proclamations are to be indorsed; after this, it is to be brought to the Chirographers, who is first to make that Note thereof that is called the Note of the fine; and hereupon if it be a Remainder, Reversion, Rent or Seigniorie whereof the fine is levied, the writ of *Quid juris clamus, Per qua servitia, Quem redditum reddis*, as the case requireth, must be sued forth. And after this, the Chirographer is to enter the fine of record, to ingross it, and to make and to deliver the Indentures thereof unto the Conufee, and if it be a fine with Proclamations, it is

4. The manner and order of levying of a Fine.

Experientia Stat. de modo levandi Fin. 8 E. 1. West Sym. ut supra. 1 H. 7. 9. Broo. Fine 116.

to be proclaimed openly in the Court of Common Pleas once every one of the four termes next after the ingrossing of it, (and it was to be proclaimed within the County where the land did lye at every assises and sessions the next year after the ingrossing of it, but this it seems is not necessary now) and the next terme after the ingrossing of it the contents thereof are to be recorded in a Table (made for that purpose) to be set up in the Court of Common Pleas at Westminster in an open place all the terme time, and so also at every assise; the fine may also be inrolled and exemplified.

5. The nature, use, and fruit of a Fine.

A fine is a Record as of great antiquity, so of a high nature, great force, and much credit and esteem; and it is now become and serves for a formal conveyance of land; and one of the common assurances of the kingdome; for by this means a man may convey his land to another in fee simple, fee taile, for life or years, with reservation of rent also. It is therefore called a Feoffment of record, for it doth countervail a Feoffment with livery of seisin in the country, and it includeth all that the feoffment doth, and worketh further of his own nature, and it is indeed for many purposes the best and most excellent assurance of all others; for by the ancient common law it was so high a barre, and of so great force, and of so strong a nature in it self, that it did conclude and bar not onely such as were parties and privies thereto and their heirs, but all others of full age, out of prison, of good memory, and within the four Seas the day of the fine levied, if they did not make their claim within a year and a day. And it is still of that force, albeit it be somewhat enfeebled by some Statutes, that either it passeth all the right and interest of the Conusor to the Conusee, or else it worketh by way of extinguishment and estoppel, and doth perpetually barre the Conusor and his heirs of all present and future right and possibility of right or other collateral benefit to the thing whereof the fine is levied. And if it be a fine with proclamations, it doth in time become a perpetual barre to all others also that have right, except they doe take care to prevent the barre by their claim, action, or entry, within five years after the proclamation ended. And it barreth Intailes peremptorily whether the heire do claim within five years or not; if he make his claim by him that levied the fine.

6. What shall be said a good Fine, or not, and how.

1. In respect of the persons thereunto and their capacity. And by, or to, whom a Fine may be Levied, and how.

Any person male or female body sole, or corporate; that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a conusor therein; but there are certain persons prohibited by law, which the Judges or Commissioners that take the consufance of fines ought not to admit or receive, and yet if they do admit them, and a fine be levied by such persons, the fine is good and unavoidable. *Etiam debet sed fallunt valet.* and of this sort are madmen, lunatics, villaines, Idcoits, men that have the Lethergy, dotting old persons that want discretion, drunken men, and men that are forced to

Statute of Fines 18. E. 1. Co. 1. 3. Plow. 358. 363.

Wes. Sym. in his Treatise of Fines. 17 E. 3. 3. 17 Aff. pl. 17 Lit. Sect. 731. Perk. Sec. 24. Fitz Fines 130. See in Grant in 6ra chap. 12 Nam. 4.

it by threatning, imprisonment or the like, also such as are borne blind, deaf and dumb, but a man that becomes so accidentally may be received and ought not to be refused. Also persons attainted of felony or treason ought not to be received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the King and the Lord of whom their lands whereof the fine is levied, are held for their times: but persons waived or outlawed in personal actions only ought not to be refused. Also Infants ought not to be received to levy a fine, and yet if an Infant be admitted to levy a fine, and he do not avoid by writ of error during his minority (as he may if it be not a fine *Sur Grant and Render* in tail or for life) the fine will be good for ever against him and all others. And if he die during his nonage, before he hath avoided it, it seems his heire can never avoid it, and yet upon this point the Judges of the Common Pleas have been divided on a solemn argument, and of this Just. *Dod. in 17. fac.* made a Quere. Also women that have husbands ought not to be admitted alone without their husbands to levie fines, and yet if such a woman alone levy a fine of her own land she hath in fee simple, and her husband do not avoid it (as he may if he will) by writ of Error, entry or otherwise during his life, or after her death during his own life, if he be tenant by the Curtesie, this is now a good fine, and will bind her and her heirs for ever, except she be an Infant at the time of the fine levied, and her husband happen to die during her minority; for then in that Case, if it be not a fine *Sur Grant & Render* to her in taile or for life, she may avoid it during her minority; but if the coverture continue until her full age, in that case she cannot avoid it except her husband joyn with her in it, but the husband and wife ought to be received together to levy any fine of her land. If such persons as are civilly dead, as Fryres, Monks, and the like, be admitted to levy a fine, the fine is void. But such civill bodies as have absolute estate in their possessions, as Major and Commonalty, Dean and Chapter, Colleges, and other Societies corporate, may levy fines of the lands they hold in common, Even by the common Law, and such fines are good; but Ecclesiastical persons, as Bishops, Deans, Masters of Hospitals, parsons, Vicars, Prebends, and such like, are by divers Statutes restrained to levy fines of their spirituall inheritances.

Any person that hath capacity to take by grant, or may be a grantee by deed, may take by fine and be a Conusee therein, as any person male or female, of full age or under age, whether it be a *Fine Coviert*, mad person, lunatique, Ideot, any person in prison, or beyond the Sea, also any person attainted of felony or treason, or outlawed in any personal action, a Bastard, Clark convict, or Alien, may be Conusee in a fine, and a fine levied to such persons is good. Also Corporations spirituall and temporall may be conusees in fines, and fines

may be conusees or conusees. And by what names. Persons attainted. *Non sana memoria, Infants.*

— *que.*
Women covert.

Corporations.

4 17 E. 3.
52. Cramp
Jur. 37. 20
E 24. 13.

Perk. Sect.
19
Dyer 220
& per Just.
Bridgman's
opinion in
private.
17 E. 3.
51. 30 E 3.
5.
27 Aff. pl.
53 Perk.
Sect. 19.
20. Co. 7.
8. —

West
Symt. part
2 Sect. 9.
Plow. 538.
575.
Co. 11. 78
1. in Mag.
dalen Col.
leg calc.

3 H. 6 42.
41 E 3. 7.
50 E. 3. 09.
24 E. 2. 62.

5 H. 7. 25.
19 H. 6. 25
Dyer. 1182.

levied to them are good, but before the ingrossing of such fines there goeth alwayes a writ to the Justices of the common Pleas, *Quod permittant finem illum levari*. But such persons as are civilly dead, as Fryers, Monks and the like, cannot be conusees in a fine, and therefore for a fine levied to such persons is void.

The names of Cognisors and Cognisees in fines must be certainly set down, and they must for the most part be described by their right names of Baptisme and Surname, whether they be King, Princes, Dukes, Marqueses, Earles, Vicounts, Barons, Lords, or Knights, which be names of dignity, but some of these are sometimes described without their surname, as *Georg' Comes Salop. Johannes Dux Lancast'.* or whether they be Esquires or Gentlemen, which be names of worship and honour. But these additions of names of dignity and honour given to such persons or any others, as Bishops and the like, are used in fines rather of curtesie then of necessity, for they are not needfull in fines. But in case where there be two of one name it is safe to make some addition by way of distinction, as *Senior* and *Junior* and the like.

West.
Symb. In
his Tract
of Fines.

If a woman leaving her first husband, take a second husband, and with him and by his name knowledg a fine, it seems this is void because of this mistake, but if a woman with her right husband, by a wrong Christian name, levy a fine she is concluded by it, and cannot avoid it during her life. c And yet if a fine be levied to a man and his wife by a wrong name, as to *A.* and *Sibill* his wife, when her name is *Isabell*, this is holden to be void. f But if a fine be levied by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it seems this fine is a good fine.

7 H. 4. 22.

e 1 Aff. pl.
11.

f F. N. B.
97 a Litt.
Broo. Sect.
344.

2. In respect of the persons before whom it is acknowledged, and the persons and place before whom and where it is recorded. And what persons may take conu-
sance of fines or record them.
And where, and how, and the duty of such persons therein.

The Persons or Judges before whom a Fine is to be levied are of two sorts, for some are Judges only at the time of the Cognisance and Certificate thereof, and others are Judges to whom the Cognisance is to be certified, and before whom it is to be recorded. The first sort are such as have power to take such Cognisance, either *ex officio*, and by vertue of their offices, or by some commission general or special granted unto them by the King out of Chancery, as all or any two of the Justices of the Common Pleas may in open Court take knowledge of fines and record them by vertue of their office. Or the Cheif Justice of that Court may by the Prerogative of his place take cognisance of fines in any place out of the Court, and certifye the same without any writ of *Dedimus ptestatem*: and so also as it seems may two of the Justices of that Court with the consent of the rest, or one of them with a Knight (but this is not usual at this day.) k Also Justices of assise by the generall words of their Patents may take & certifye cognisances of fines without any special *Dedimus ptestatem*, but at this day they do not use to certifye them without

West.
Symb. ubi
supra.

Stat. 25.
E. 2. Stat.
de Carli.
Dyer 224.
Crompt.
Jur.

Stat. 15.
E. B. Broo.
Fines 20.

Dyer 224.
Broo.
Fines 140.

a speciall writ of *Dedimus potestatem*, and fines have been levied before Justices Errants.

Crompt.
Jur. 92. F
N. B. 147.
a. b. 146.
F. G.

Also Cognisances of fines are taken by a speciall writ issuing out of the Chancery called a *Dedimus potestatem*, whereby commission is given in divers Cases to a private man for the speeding of some Act appertaining to a Judge upon a surmise that the parties that are to doe the same are not able to travell, and by this writ upon such a surmise, power may be given to any Serjeant at law alone, or to any Knight and Gentleman together to take the consufance of such persons, and they may by vertue thereof take the same either of all or some of the parties; and that (as it seems) in any place accordingly: But a Justice or other person being cognisee in a fine may not take the cognisance thereof himself. And all these that have power to take the consufances of fines are to take great heed of whom they do take the same, and whom they doe admit to make such consufances before them. And therefore they are to see that they know the parties that are to be Cognisfors, that they suffer not one man to make a consufance in anothers mans name, and that they do not take any consufance from any person prohibited by Law, for misdemea-

Curia 39.
& 40 El.
17 Dyer.
320. H. 6.
21.

34 H. 6.
19 Brooc.
Fines 11.
Crompt.
Jur. 32.
92.

42 E. 3. 7.
3 H. 6. 42.
Perk.
Sed. & St.
Doct. 155.
Crompt.
Jur. 55.

Stat. 23.
El. chap.
3. Dyer
30 Dyer
220.
Crompt.
Jur. 92.

Regist. or.
68. F. N. B.
147. b.

Dyer 146.
1 H7.
Brooc. Fine
134. Dyer
et. 220.
Stat. 25.
F. 44. 44
E. 3 38.

nors by such persons herein are punishable in the Star-Chamber. And if there be any woman that hath a husband that doth joyn with her husband in the consufance, the Judges or Commissioners must take care they doe examine her whether shee be willing, and do part with her right in the land willingly or by compulsion of her husband; for albeit she be made to doe it by compulsion of her husband, yet hath she no way to releive her self when it is done. And after the Commissioners have taken the same cognisances by *Dedimus potestatem*, they are to certifie the same truly, and the day and yeare when it was taken, and not another time (for this may be a misdemeanor punishable in Star-Chamber) and to return the commission into the Court of Common Pleas under their hands and seals within a year after the taking of the same consufance, at the farthest. And if they refuse to return or certifie it, the party grieved may by a writ called *Cognitionibus admittendis* or a *Certiorare* compell that Commissioner that hath it in his custody, or his executor or administrator if he be dead, to certifie it. But if any of the cognisfors happen to die before it be certified, then it cannot be certified at all, for it cannot now be made a good fine. And so also (as some hold) if the King die. But if the Kings silver be entred in paper or upon the back of the writ of covenant (as the use is) and the party die after this, in this case the fine may go on and will be a good fine notwithstanding the death of the party.

And Judges for the recording of fines be the Justices of the comon Pleas onely, and therefore all cognisances of fines must be certified thither, for in that Court onely and not in any other of the Courts

*Dedimus po-
testatem, quid.*

*Regist. or
68. F. N. B.
147. b.*

quid -

*Cognitionibus
admittendis,
quid.*

of Record at Westminster, or in other inferior Court, or ancient demesne, are fines to be levied. But by special grant a fine may be levied in a base Court And by certain Acts of Parliament fines may be and are levied in the county Palatine of Chester, county Palatine of Lancaster, and county Palatine of Duresme, of lands lying within those places And if any persons do take consuance of fines, or other then such as before that have power, or any other persons or judges shall record fines, or they shall be levied in any other Court or place then as before, such fines are void.

50 Affl.
Stat. 2.
E. 6. chop.
28. 37 H
E. c. 19. 3
3 Eliz. c. 37

9. In respect of the thing whereof the Fine is levied, and of what things a Fine may be levied or not, and by what names.

A fine may be levied of all things whereof a *Precipe quod reddat* lieth, and of all things which are inheritable and in esse at the time of the fine levied, whether the thing be Ecclesiasticall and made temporall, or temporall As of an Honor, Manor, Island, Barony, Castle, Messuage, Cottage, Mill, Toft, Courtilage, Dove house, Garden, Orchard, Land, Meadow, Pasture, Wood, Underwood, Chappel River, Chauntry, Corrody, Office, Fishing, Warren, Fair, Rectory, Mines, a view of Frankepledge, Waife, Estray, Felons goods, Deodands, Hospitall, Furzes, Heath, Moore, Rent, Common, Advowson, Hundred, Way, Ferry, Franchise, Seigniorie, Reversion, Toll, Tallage, Pickage, Pontage, Aquidalle, Services, Portion of Tithes, Oblations, or the like And therefore fines *De honoribus de S.* or *De S. Manerio de S.* or *De Castro*, or *De Castello de S. cum pertinentiis* are good. So fines *De uno messuagio, uno cottagio, uno molendino*, without *Aquaticco* or *Granatico* annexed are good. So fines *De uno Tofto, uno Curtilagio, uno Columbario, uno gardino, uno pomario, decem acris terre, decem acris prati, decem acris passurae, decem acris bosci, decem acris subbosci, de Balliva sive officio Balliva. de D. de Custodia sive officio custodi. de B. de custodia parci & foreste de D. officio senescallie de S. cum pertinentiis, decem acris bruerie, decem acris more, decem acris uncariae, decem acris marisci, decem acris alneti, decem acris ruscariae*, are good. Also fines may be *De vis. Franc. pleg. libertate & Franchesia in D. Wardis, Maritagio, Eschat. catall. scilicet, de Wariat. extrahitur. de catall. fugitivorum, utlagat. attinent. de ferreis, Mercat. Wrecco maris, Or, de rectoria Ecclesie parochialis de M. or, De decimis granorum, garbarum & sani eidem rectoria spectant &c. Or cum omnibus decimis granorum, garbarum & sani eidem rectoria spectant. Or, de decimis garbarum, ad ecclesiam de M. qualitercumque spectant. Or de omnibus & omnimoda oblationibus, decimis granorum, garbarum, sani, lane, lini, canabie, portellorum, uncarii, agelli &c. & aliis emolumentis quibuscumque spectant crescent sive existunt cum pertinentiis in D. Also fines may be *De cidio Saliu plumarum, aque salsa puteo, Or, de theolonio, stallagio, pieagio, pontagio, infra Burgu de D. Or, de quodam corrodio uirum panis, unius lagenae cervisiae pro omnibus hominibus in D. Or, de chumino, de piscariis, or de libera warrenna, or de fr. rk sold, de franc. egi, or de nundinis de D. singulis annis ad festu de M. ibidem tenent.**

Stat. 32.
H. 8. c. 7.
West.
Symb. in
his Tract
of Fines
Sect. 25.
50. see in
exposition
of deeds
infra
Numb.

Mer cat.

Mercat' de D. Quic. sine libero passagio ultra aquam de D. Or. de communia, or de pastura pro omnibus animalibus, or pro omnibus auriis, or de pastura pro decem ovibus or pro decem bobibus, equis, vaccis, porcis, spadinibus, &c. or de communia pastura quod pradiet M. B. habet & habere solebat pro omnibus auriis suis in centum acris terra ipsius. I. A. in D. or de advocacione ecclesia de D. or de advocacione tertia partis ecclesia, &c. or de rectoria de D. or de advocat. praesentat. donat. libera dispositione, & iure patronatus Ecclesia de D. or de Patronagio cum advocacione vicaria Ecclesia, de D. & capell. eidem rectoria annex', or de tertia parte advocacionis ecclesia, &c. or de medietate advocat' Ecclesia, or de advocacione medietatis Ecclesia, or de medietate, or de tertia parte messuagii, decem acris terra, or the like, and these fines are good. Also a fine may be de homagio, or de feod', militis, or de uno feod' missi' in D. or de servitio unius parvi calcarium deauratorum, or de servitio inveniendi hominem equitem or peditem ad eundem vel ad equitandum with the cognisee in exercitum Wallia, &c. or de minera plumbi & cuiuscunque generis metalli, or de presens officii, or de presens molendini, or de gurgite, or cursu aquae current. à loco vocat' H. infra & per terr' vic' K. ad mol. ind. vocat. B. or de vera sine veda in D. And fines of all these and such like things are good; but a fine that is levied of a thing not certain, as de tenementis or de hereditamento or the like, is void.

21 E. 3. 41.
18 E. 4. 23
West. Syr.
Ibid.

A Fine may be of a rent charge which had no being before, or of a chief rent or other rent which had a being before, but not of annuity; and a rent will pass by the number of the things to be rendered, as *De decem librar. decem marcat. sexdenar' or quinq' solidor' or uno obolario* As *Precipe A. quod reddat B. con. &c. de 4 librar' reddit. et rea' dimia' unius libra pipariu, ac reddit. unius parvi chirothecarum, sagitta barbare, unius parvi calceorum, unius vomeris, 1 lib. cera, 1 lib. pipariu, 1 lib. cumini, 1 Clovi Gariophylli, 1 rosa rubra, 1 acua & sili, quarterii frumenti, unius quarterii hordei, 2 Bractes caponum, 40 Gallinarum, 20 Gallinarum, mille ovium et avarum.* an Honor may pass by the name of a Manor, or by his own proper name, as *de honore de Tickhill*, or *de manerio de Tickhill*: so other things may most of them pass by their own proper names, as *de castro vice comitatus de S. insula de D. Hundred de D. Burgo de D.*

19 E. 4. 9.

A Manor may pass by his proper name without naming of the town or place, towns or places wherein it doth lie, as *de manerio de D. cum pertinent.*

Other things may pass in fines by the same names they are granted in deeds, as *de seic. ambis et precin' nuper Monasterii de D. Scis. Manerii de D. Grangia de D. Parco de D. prabend' de D.*

26 Aff. P.
54.
2 E. 3. 36.
1 E. 4.
27 H. 6.

A Castle or Hundred may be parcell of a Manor and pass by the name of the Manor whereof they be parcell, and one Manor may be parcell of another Manor, and pass by the name of that Manor, or

of Record at Westminster, or in other inferiour Court, or ancient demesne, are fines to be levied. But by special grant a fine may be levied in a base Court And by certain Acts of Parliament fines may be and are levied in the county Palatine of Chester, county Palatine of Lancaster, and county Palatine of Duresme, of lands lying within those places And if any persons do take consueance of fines, or other then such as before that have power, or any other persons or Judges shall record fines, or they shall be levied in any other Court or place then as before, such fines are void.

50 Asspl.

Stat. 7.

E. 6. chap.

28. 37 H

2. c. 19. 3

3 Eliz. c. 27

9. In respect of the thing whereof the Fine is levied, and of what things a Fine may be levied or not, and by what names.

A fine may be levied of all things whereof a *Preceptum redditus* lieth, and of all things which are inheritable and in esse at the time of the fine levied, whether the thing be Ecclesiasticall and made temporall, or temporall As of an Honor, Manor, Island, Barony, Castle, Messuage, Cortage, Mill, Toft, Courtilage, Dove house, Garden, Orchard, Land, Meadow, Pasture, Wood, Underwood, Chappel River, Chauntry, Corrody, Office, Fishing, Warren, Fair, Rectory, Mines, a view of Frankpledge, Waife, Elstray, Felons goods, Deodands, Hospitall, Furzes, Heath, Moore, Rent, Common, Advowson, Hundred, Way, Ferry, Franchife, Seigniorie, Reversion, Toll, Tallage, Pickage, Pontage, Aquittalle, Services, Portion of Tithes, Oblations, or the like. And therefore fines *De honore de S. or De S. Manerio de S. or De Castro, or De Castello de S. cum pertinencia* are good. So fines *De uno messuagio, uno cortagio, uno molendino*, without *Aquaticum* or *Granaticum* annexed are good. So fines *De uno Tofto, uno Curtilag. uno Columbario, uno gardino, uno pomario, decem acris terre, decem acris prati, decem acris passura, decem acris bosci, decem acris sub. bosci, de Balliva sive officio Balliva. de D. de Custod. sive officio custod. de D. de custod. parci & ferresta de D. officio senescalcie de S. cum pertinentia, decem acris bruerie, decem acris mora, decem acris uncaria, decem acris marisci, decem acris alieti, decem acris ruscaria*, are good. Also fines may be *De vis. Fran. pleg. libertate & Franchisia in D. Wardis, Maritagis, Eschat. catall. felonum, Wavias. extrahur. de catall. fugitivorum, utlagat. astinct. de ferreis, Mercat. Wrecco maris, Or, de rectoria Ecclesie parochialis de M. or, De decimis granorum, garbarum & sani eidem rectoria spectant &c. Or cum omnibus decimis granorum, garbarum & sani eidem rectoria spectant. Or, de decimis garbarum, ad ecclesiam de M. qualitercunque spectant. Or de omnibus & omnimoda oblationibus, decimis granorum, garbarum, sani, lana, lini, canabis, porcellorum, aucarii, agell. or &c. & aliis emolumentis quibuscunque spectant crescent sive existunt cum pertinentia in D. Also fines may be *De cidio Satium plumarum, aqua salsa puteo, Or, de theolonio, stallagio, picagio, pontagio, infra Burgum de D. Or, de quodam corrodio n. i. sui panis, unum lagenam cervisie pro omnibus hominibus in D. Or, de chivinio, de piscariis, or de libera warrenna, or de fr. rk sold, de franc. e. f. i. or de nundinis de D. singulis annis ad festum de M. ibidem tenent.**

Stat. 32.

H. 8. c. 7

West.

Symb in

his Tract

of Fines

Sect. 25.

50. see in

exposition

of deeds

infra

Numb.

Mercat.

Mercat' de D. Quiet. sive libera passagio ultra aquam de D. Or, de communia, or de pastura pro omnibus animalibus, or pro omnibus averiis, or de pastura pro decem ovibus, or pro decem bobus, equis, vaccis, porcis, spadonibus, &c. or de communia pastura quod pradiet' M. B. habet & habere solebat pro omnibus averiis suis in centum acris terrae ipsius. I. A. in D. or de advocacione ecclesie de D. or de advocacione tertie partis ecclesie, &c. or de rectoria de D. or de advocat. presentat. donat. libera dispositione, & iure patronatus Ecclesie de D. or de Patronagio cum advocacione vicaria Ecclesie, de D. & capell. eidem rectorie annex', or de tertie parte advocacionis ecclesie, &c. or de medietat' advocat' Ecclesie, or de advocacione medietatis Ecclesie, or de medietate, or de tertie parte messuagii, decem acris terrae, or the like, and these fines are good. Also a fine may be de homagio, or de feod' militis, or de uno feod' milit' in D. or de servitio unius parvi calcarum decurionum, or de servitio inveniendi hominem equitem or peditum ad eundem vel ad equitandum with the cognisee in rancine Wallia, &c. or de minera plumbi & cuiuscunque generis metalli, or de proficuo officii, or de proficuo molendini, or de gurgite, or cursu aquae currend. à loco vocat' H. infra & per terr' vic' K. ad mol. ind. vocat' B. or de vera sive veda in D. And fines of all these and such like things are good; but a fine that is levied of a thing not certain, as de teneamento or de hereditamento or the like, is void.

21 E. 2. 44.

18 E. 4. 22

West. Sym.

Ibid.

A Fine may be of a rent charge which had no being before, or of a chief rent or other rent which had a being before, but not of annuity; and a rent will pass by the number of the things to be rendered, as *De decem librar. decem marcat. sexdenar' or quinquar solidor' or uno obolario* As *Precipe d. quod reddat B. con. &c. de 2 librar' reddit. et rea dimia' unius libra piperis, ac reddit. unius parvi chirotheocarum, sagitta barbare, unius parvi calceorum, unius vimeris, 1 lib. cera, 1 lib. piperis, 1 lib. cumini, 1 Clovi Gariophylli, 1 rosa rubra, 1 acus & filii, quarterii frumenti, unius quarterii bordii, 2 Bracci caponum, 40 Gallinorum, 20 Gallinarum, mille ovorum et aucarum.* an Honor may pass by the name of a Manor, or by his own proper name, as *de honore de Tickhill, or de manerio de Tickhill*: 40 other things may most of them pass by their own proper names, as *de castro vice cumitatus de S. insula de D. Hundred de D. Burgo de D.*

19 E. 4. 9.

A Manor may pass by his proper name without naming of the town or place, towns or places wherein it doth lie, as *de manerio de D. cum pertinent.*

Other things may pass in fines by the same names they are granted in deeds, as *de seir. ambis et precint' nuper Monasterii de D. Scis. Manerii de D. Grangia de D. Parco, de D. prabend' de D.*

36 Aff. p.

34.

2 E. 3. 36.

1 E. 2. 4.

27 H. 6. 2.

A Castle or Hundred may be parcell of a Manor, and pass by the name of the Manor whereof they be parcell, and one Manor may be parcell of another Manor, and pass by the name of that Manor, or

a castle may pass by his own proper name, as *de castello de S. cum pertinentiis*, so also may a hundred pass by his own name, as *de hundred de S.*

A view of frankfealderie, and such like things may also pass by their own names, as *Devis. frankpledge bonorum et catallorum, wai-viorum, felon fugitivorum, utlagas. in exigenda positurum, felon de se, decedant, thesauri inventi ac extrahuntur cum pertinentiis in M.*

West ubi
supra.

By the name of a messuage may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop, a mill as parcell of the same. The like of a cottage, a toft, a chamber, a cellar, &c. Yet these may pass by their own single names also, as *De uno messuagio, uno curtilagio, &c.*

Plow. 169.
171.

A Chappell or an Hospital must be demanded in a fine, and may pass by the name of a messuage.

13 Aff. pl. q.
2.

A Reversion of land may pass by the name of a Reversion, or by the name of the land it self.

43 E. 3. B.
1.

A Foldage may pass by the name of *D. libertate unius Faldagii cursu ovium cum pertinentiis* in F. or *de libera Faldagio ovium cum pertinentiis* in F. or *de libera Falda.*

West ubi
supra.

Land, Meadow, or Pasture, Wood and the like, may pass by a certain number of acres, or by the certain measure of the superficial quantity thereof, as *De Hida, Carucata, Bovata, Virgata, Acra, Roda, Furlingo terra*, House-boot, Hay-boot, and Plow-boot, may pass by the name of Estovers, as *De rationabili estoverio in boscis, viz. in decem acris bosci ipsius A. in D.* And a fishing may pass by the name of *Separali piscari in aqua de S.*

16 Aff. 9.

VVest.
Sym. ubi
supra.

And High-wood and Under-wood may pass by the name of wood, as *de 20. acris bosci, &c.*

West.
Symb. ubi
supra.

Parsonages, Rectories, Advowsons, Vicarages, or Tithes impropriate pass not by the names *de advocacione ecclesie*, but *de Rectoria ecclesie de S. cum pertinentiis*. But when the fine is but of a presentation to a Church onely, it must be *de advocacione ecclesie de S.* and not *cum pertinentiis*, and of all Vicarages endowed the writ must be *de advocacione vicaria ecclesie de S.* and not *cum pertinentiis*, and where no vicarage is indowed, it must pass under these words, *de advocacione ecclesie de S. &c.*

If part of an entire thing pass, it must pass by these words, *de medietate, tertia parte, quarta parte, &c.* as the Case is, as *de duobus partibus in tres partes dividenda. 8. acr. terra, or de medietate omnium decimarum, granorum et feni de ter vocat' 10 Blacklands cum pertinentiis in H.* But if an entire thing as a Manor or Messuage be parted, as if the Manor of S. be divided into two parts, (if the division be so made that the Manor of that part be not extinct) and a fine be to be levied of a part of it, it must pass by the name of the whole, as *de manerio de S.* So if a Messuage and 20 acres be parted, the part divided shall pass by the name of one Messuage and 10 acres of land

land, and not by the name *de medietate unius messuagii & viginti ac^r ter*. And if things be otherwise named then as before, sometimes the fine will thereby lose his force in all, and sometimes in part. But if a thing be twice named in a writ of covenant, as a Manor, and a Hundred parcell of the same, this will not hurt the fine.

Broo.
Fines 44.
91. 9 E. 4.
6.

The things that do pass by the fine must be named to lye in the Shire, Town, Parish, or Hamlet, where it doth lie; for a fine is good albeit it name the lands to lie in a Hamlet, or in a town decayed; but it is good to name the town wherein the Hamlet is, and that with addition for distinction if there be divers towns of the same name in that County. And if a Manor extend into divers Towns, as into *A. B. and C.* it is good to express all or none, as *de Manerio de S. in A. B. and C.* For if any of the towns be omitted, none of the Manor in that town will pass; but if the fine be of the Manor of *S. cum pertinen* and say not where it lieth, this fine will carry the whole Manor. And if there be divers Manors of one name, as *South S. and North S.* or the like, it is safe to set down in the writ for the fine which Manor is intended to be passed; howsoever the fine may be good of the Manor intended to be passed without the distinction.

7 H. 6. 39.
Flow. 163.
Regist. 2.

The order of placing things in fines, is, First, to set down the most worthy things before things less worthy, as a Manor before a Messuage, a Castle before a Manor, a House before land, arable land before meddow, meddow before pasture, &c. Secondly, to set down things general before things special, as land (being the *Genus* of Meddow, Pasture, Wood, &c.) before them, Wood (being the *Genus* to wood grounds, as *alnetum, salicetum*) before them. Thirdly, to set down entire things before parts of things, as *de Manerio de S. & medietate Manerii de B.* Fourthly, to set down particular things after this manner.

suagium, tum, lendinum, umbare dinum ra, ium, iura. cum, ra
Mes, Tos, Mol, Col, Gar, Ter, Pra, Pas, Bos, Byne, Mora.
ria, cus, tum cavia, ditum,
Iunca, Maris, alne, rus, red, Spektare priora.

And yet if this order be not observed, but the things be otherwise placed in the writ, if it be suffered to pass, the fine will be good enough.

Stat 27 E.
1. ch. 1. 41.
E. 3. 14. 44.
E. 3. 36.
39. E. 3.
16. 17 E.
3. 62. 24
E. 3. 16.

If either the Cognisor or Cognisee at the time of the fine levied be seised of any estate of freehold in fee simple, fee taile, or for life in possession, reversion or remainder, whether the same be by right or wrong the fine will be a good fine in this respect. And therefore if one that is seised of Land in fee simple, or fee taile: general or special, levy a fine of this land to a stranger, this is a good fine. So if a Stranger levy a fine to him of this land, this is a good fine. So also a fine levied by, or to, a tenant for life of the land he doth so

4. In respect
of the estate
of the parties
thereunto.

hold

Forfeiture.

hold is good in this respect: but he must take heed of a forfeiture in this case; for if tenant for life levy a fine *sur Cognisance de droit come ceo*, &c. to a stranger, or levy a fine *sur Grant & Release* to a stranger, to hold to the cognisee for a longer time then for the life of the tenant for life, however in this case the fine be a good fine, yet this is a forfeiture of the estate of the tenant for life, whereof he in reversion or remainder may take present advantage. And yet if such a tenant for life levy a fine *sur Grant & Release*, to hold to the cognisee for the life of the tenant for life, or grant his estate by such a fine to him in reversion or remainder, or by fine grant a rent out of the land for longer time then for his own life, in these cases the fine is good, and there is no forfeiture of the state of the tenant for life. So likewise if a fine be levied to a tenant for life by a stranger, who doth thereby acknowledge all his right to be in the tenant for life, and release and quite claim to him and his heirs, and go no further, this is a good fine, and no forfeiture of the estate of the tenant for life, for his estate is not changed thereby, and it may enure to him in reversion, but if the stranger say further in the fine *Come ceo que il ad de son done*, this is a forfeiture.

1 H. 7. 32.
Co. 2. 56.
9. 106.

Estoppel.

But if neither the cognisor nor cognisee be seised of any estate of freehold in possession or reversion of the lands whereof the fine is levied at the time of the levying of the same, but have onely a lease for years, or not so much, the fine is void and of no force as to any stranger, however it may be good between the parties by way of Estoppel. And therefore if a lessee for years, or a disseisee, or one that hath right onely to a remainder or reversion levy a fine to a stranger that hath nothing in the land, this fine is void, or at least voydable as to, and by any stranger thereunto, and he that hath cause may shew that the freehold estate and seisin of the land was in another before and at the time of the fine levied, and that *Partes finis nihil habuerunt tempore levationis finis*, and by this avoid it. And yet a vouchee after he hath entred into the warranty may leavy a fine unto the demandant, but not to a stranger. And a disseisor may levy a fine to a stranger that hath nothing in the land, and this is a good fine; for he hath the fee simple by wrong in him. Also the issue in tail may be barred by way of Estoppel, by a fine levied by Ancestor being tenant in tail, albeit neither consor nor consuee have any estate of Freehold in the land. a Joint tenant, tenant in common or Coparcenour, may levy a fine of his part to a stranger, and this will be a good fine. And so also as it seems may one Coparcenour or tenant in common to another.

Co. 5. 123.
3. 88. 90.
super Lit.
251. 3 H.
7. 9. 5 H.
7. 41. 3
H. 6. 31.
27 H. 8. 4.

One single member of a corporation aggregate of many cannot levy a fine of the lands of the corporation, as the Major or Master of a Colledge cannot levy a fine without the communalty, or his fellows, &c. But such persons may levy fines of the lands they are solely seised in their own right as other men may do.

Such

26 H. 8.
9. Dyer
334. 69.
Plow. 375.
338.
E. 4. 11.
11 E. 4. 63.

Co. 11. 78, Such as have estates of freehold in Ecclesiastical lands in the right of their Churches, houses, &c, as Bishops, Deanes and Chapters, Prebends, Persons and the like, may not levy a fine of such lands; for if they do it will not bind the successor.

Stat. 32. H. 2. chap. 28.
1 E. 4. 12.
Co. 6. 55.
Bro. Fines
121. Stat.
31 H. 8. ch.
36. Co. 5. 3
4. Stat. 1
H. 7. chap.
20.
He that hath an estate of fee simple in lands in the right of his wife ought not to leavy a fine thereof without her, and if he do, she and her heires may avoid it after his death. Also he that hath an estate of lands given in taile by the King, or by the provision of the King, ought not to leavy a fine of this land, for it is void as against the issue in taile and the King. Also he that hath an estate of lands that are prohibited to be sold by Act of Parliament, ought not to levy a fine of such land. Also she that hath an estate of lands of her husband, or of any of his ancestors assured to her for her Jointure, Dower, or in taile by the means of her husband or any of his ancestors, may not levy a fine of this land, for if she grant a greater estate then for her own life this worketh a present forfeiture.

West.
Symb. ubi
supra. Sect
30. Co. 5.
28.

In the concords of Fines some things are to be regarded in the manner and forme, and some things in the matter and substance. First, when a fine is levied to divers Cognisees the right shall be limited to one of them: As if a fine be levied by A. to B. and C. it shall say, *Quod predicti A. recognoverit tenementa predicti esse ipsius B. ut illi qua iidem B. et C. habent, &c.* But the Kings tenant may acknowledg the right to be in divers. Secondly, the state shall be limited to his heirs onely to whom the right is limited, and not to the heire of all the cognisees, as thus, *Quod predicti A. cognoverit tenementa predicti esse ipsius B. ut illi qua iidem B. & C. habent de dono predicti A. & illi remisit & quiet clam de se & hered suis prefati B. et C. et heredes ipsius B. &c.* The release and warranty must be from the heires of one of the Cognisors, where there be more then one; for in a fine from divers the fee is supposed to be in one onely, And therefore it must be thus, *Quod predicti A. & B. cogn. & illi remisit &c. de se & hered ipsius A. Et eidem A. et B. concesserunt pro se et hered ipsius A, quod ipsi war tenementa, &c. si contra se et heredes ipsius A. imperpetuum.* But if the fine be of lands in Gavilkind, *contra.* Fourthly, the Concord need not to rehearse all the speciall names of the things contained in the writ, but it is sufficient to say, *Tenementa predicta; as quid predicti recognoverit tenementa predicta, &c.* Fifthly, as a Concord cannot be without an originall writ, so it must pursue the originall writ, and cannot be of any forrain thing, i. such a thing as is not contained in the writ, except it be consequent thereunto, as when the writ is of land, there may be in the concord of a rent out of this land, but there may be more things in the *Precipe* then are named in the Concord. A Concord may be with an exception of some part, but this exception must alwaies be of such things whereof the writ will lie and are mentioned therein, must.

5. In respect of the Concord and matters touching it. And what concord or agreement may be made by Fine or not.

must be certainly named, and must succeed the things out of which they be excepted, as *Precipe A. B. quod tenant C. D. conveni &c. de manerio de D. cum pertinen in C. (except uno messuagio duabus acris terra, et advocacione Ecclesie de C. &c. Et est concordia, &c. quod p ad A. cogn tenementa predict cum pertinen (except. praecept.)* And in all these and such like cases as before, where the concord is not formal, the Judges ought not to receive the fine nor suffer it to pass, but if they do and the fine be finished, it cannot afterwards be avoided by writ of error or otherwise for these faults.

The concord and agreement may be made of an estate in fee simple, fee taile, for life, or for years; it may be also of divers remainders, and that to them that are no parties but strangers to the fine. It may be also single or double, with a render back again in some estate of the same land or some rent out of it, so as a Concord may have in it a reservation of rent, a clause of distress, or *Nom ne pena* and a warranty. ^b And therefore if *A.* levy a fine to *B.* *sur cognisance de droit come ceo, &c.* And *B.* by the same Concord do grant and render the land back again to *A.* for life without impeachment of waste, the remainder to *C.* the wife of *A.* for her life, the remainder to *A.* and his heirs, this is a good Concord and by this devise a Jointure may be and is oftentimes made to a woman. And if a man would have a lease for life or years made of land by fine, the lessee must by the concord acknowledge the lands to be the right of the lessor (who is seised of the land) as that, &c. And then the lessor must grant and render the same land back again to the lessee (the cognisor) in the fine for life, or for a certain number of years as the agreement is, reserving a rent with clause of distress, and this is a good fine, and a common devise for this purpose. But if the lessor be tenant in taile, it seems this fine will not bind the issue in taile. And yet if *A.* tenant in taile, and *N.* do by fine acknowledge the land to be the right of a stranger, as that &c. and then the stranger that is cognisee doth grant and render the land again to *N.* for life, or years with clause of distress, &c. and then grant and render the reversion to the tenant in taile, this is a good fine, and will barr the issue in taile also, and will likewise pass the rent and the reversion to the tenant in taile. So if a stranger that hath nothing in the land levy a fine *sur cognisance de droit come ceo que il ad, &c.* to him in remainder in taile depending upon an estate for life, and the cognisee by the same fine render to the cognisor for ten years to begin at Michzemas following and dyeth, and all the proclamations are made after his death, and the tenant for life dyeth after the time the lease is to begin; this is a good fine, and so a good lease to barr the issue in taile.

If *A. B.* and *C.* levy a fine to *D.* and *D.* render the land back again to *A.* for life, the remainder to *B.* in taile, the remainder to *C.*

See in
West Sym.
divers ex-
amples,
Perk. Sect.
629 Broo.
Fines 108.

b Broo.
Fines 106.
118, Co. 6.
33. Plow.
455. Dyer.
279. Co.
1.76.

Jointure.

L. a. c.

West Sym
ubi supra.
Co. 7. 38.
in

in taile, and the remainder to a stranger in fee, this or any such like concord as this is good. And if *A.* and *B.* joyne in a fine of a mesuage to *C.* and *D.* and to the heires of *C.* who do grant and render a charge of 30l. out of the land to *A.* for his life, to begin after the death of *B.* to be paid at the feasts of, &c. *Proviso semper quod pred' concessio pred' annuallis reddit' 30l. non aliqualis' se extendat ad onerand' personas dict' C & D, sed tantum modo ad onerand' dict' mesuag' tota vita ipsius A.* and then they grant and render the mesuage to *A.* during the life of *H.* the remainder to be in taile, the remainder to the right heires of *B.* this is a good fine. But in such a fine *sur grant & render*, these things must be heeded. 1. None may take the first estate by the Concord, but the Cognifors or one of them. And therefore if *A.* knowlede a fine to *B.* and *B.* render and grant the land to *A.* *Habendum sibi & E. uxori ejus*, and the heires of their bodies; So if the husband levie a fine of his wives land, and the Cognifsee grant and render the land to the husband and wife, this is not a good Concord. 2. The render of the rent must be to one of the parties to the fine, and not to a stranger. 3. A man cannot reserve a lesse estate to himself then fee; And therefore if *A.* knowledg a fine to *B.* and *B.* render to *A.* in taile, the remainder to himself for life, this remainder is void. So if *A.* by fine knowledg lands to *B.* and *B.* grant and render the land to the Conusor in taile, the remainder to *B.* in taile, the remainder to *B.* in fee, the limitation of this estate in taile to *B.* is void, and he can never have execution of it. So if *A.* knowledg the lands to *B.* and *B.* doth grant and render to *A.* for life. 4. The agreement must be possible and seassible; for if there be three Conusors in a fine, and the Conusee render to one of them for life or years a rent, and grant the reversion to another of them for life or years rendring a rent, and grant the reversion in fee or in taile to the third, this is not a good Concord. 5. There can be no condition or clause of re-entry for not payment of rent inserted into the Concord, and yet some held a fine levied to one in taile upon a condition with a remainder over is good. (*) And such Concords as these of the last sort before ought not to be received, and if they be received, the fine in most cases may be avoyded for these faults, but if a fine be received with a condition inserted into the Concord, this is a good fine and not avoidable by writ of Error or otherwise.

1] 24 Ed.
3. 27. Bro.
Fines. 808

2] Co. 2. in
the Lord
Cromwells
case.
3] 24 Ed. 3.
26. 14 H.
4. 31 Dyer
69. 33. 34.

4] Co. 6.
33.

5] 14 Ed.
3. 11. 17 H.
8. 24.

* Co. 3. 5.
super Lit.
353. 5. 38.

Plow. 228.

2] 50 E. 3.
9.

3] Co. 5.
38.

No single fine can be with a remainder over to any other person contained in it, but it must be to the Conusee and his heires only. 2. No rent can be reserved upon a fine that is *sur Conuissance de droit come ceo*, &c. but upon a fine *sur grant & render*, or *sur concessio* only, for if one levy a fine *sur conuissance*, &c. rendring rent, this reservation is void, 3. No single or double fine shall be received with any covenants or other agreements then are before men-

tioned, but in all these cases also when the fine is received and levied, it seems it is good and unavoidable, and that only the remainder in the first case, the rent in the second, and the covenants in the last, are void, and the fine good for the residue.

A particular tenant, as for life, &c. cannot surrender his terme to him in reversion or remainder by fine, but he may grant and release it to him by fine.

44 Ed. 3.
36.

One may grant his tenements which *H* doth hold for life, and which after the death of *H*. ought to remain to him, to *H* for life, rendring rent with clause of distress, saving the reversion, and a fine of this form is good.

44 Ed. 3.
45.

The manors and tenements contained in the writ may be divided, as if a fine be levied between *A* and *B* of two Manors, and *B* doth acknowledg all his right of the said two Manors to be the right of the said *A*, as that which, &c. for which *A* doth grant and render one Manor to *B* for life, with two parts of the other Manor which *N* holdeth in dower, to have the one Manor and two parts of the other Manor to *B* for life, the remainder after his death to *A* in taile; and that after the death of *N* the third part shall remain to another. So if a fine be levied of the Manor of *G* with the appurtenances by *A* unto *C*, which *A* knowledgeth the right in *C*, as that &c. and *C* granteth and rendreth the same to *A* in taile, the remainder of the fourth part of the Manor towards the West to the said *A* and her heires; the remainder of another fourth part towards the East to *I* in fee, and so of the other two fourth parts. Or incertainly by three third parts in remainder to *A*, *B* and *C* in remainder severally, and these are good Concords.

44 Ed. 3.
11
45 Ed. 3.
11.

44 Aff. Plö.
11 Bro.
Fines 111.

If *T* and *E* his wife levy a fine to *R*, *D* and *T C* of divers Manors and lands in *A*, *B* and *C*, and in the fine there are divers grants and renders, and one grant and render is of the Manors of *A* and *B*, and the lands therein to *T* and *E*, and the heires of *T*, and in another render 100. acres parcel of one of the same Manors is granted to *E* in taile, the remainder to the right heires of a stranger, notwithstanding this repugnancy, the Concord and consequently the whole fine is good.

Co. 5. 38.

6. In respect of the manner and order of levying it, and other matters.

The fine must be levied and shed forthin that manner and order as before is set forth; for if it be not so, but that there want an Original writ, or if there be one, it doth beare *Teste* after the *Dedimus Possessorem*, or the like, it will be a defective fine, and either *ipso facto* void, or at least voidable by writ of Error.

See before.

If any one of the Conusors die before the Conusance be certified after it is acknowledged and taken, the fine cannot now be made a good fine, and yet if the Commissioners shall certify this Conusance with an antedate, and so the fine be finished, this may be a good fine at the common Law, but perhaps may be avoided by sentence in the

Dyer 120.
254. Crom.
Jur. 91.
Dyer, 246.

the Starre-Chamber. But if the Conufance be certified and the Kings silver paid to the King before the death of the Conufor, the fine may be ingrossed and finishee after his death well enough, and it will be a good fine. And if a feme sole make a Conufance of a fine, and before it be certified and ingrossed she take a husband; this will not let but the fine may be finished; and albeit it be recorded and sued out in her name as sole, whereas in truth she is covert and of another name, yet is the fine a good fine, however in this case it is not amisse to get a release of Errors from her husband.

West Syn. ubi supra. Lands that are bought of divers persons may passe by one fine, and then the writ of covenant must be brought by all the vendees against all the vendors, and they must every one of them warrant for himself and his heirs, and such a fine is good.

Dyer. 227. 15. E.d. 4. 33. If lands lie in divers shires, it may be contained in one Concord, and good enough; but there must be severall writs of Covenant in every County, else the fine will not be good.

Co. 3. 78. 8. 9. 105. If a fine be levied of Covin by a lessee for years, or life, a Copholder of purpose, and with an intent to barre him in reversion or the Lord of his inheritance, this is of no force, and therefore non-

Co. 3. 80. 16 H. 7. 5. See infra in D. ed. Nu. claimer within five years will not hurt in this case. So that it seems a fine or recovery may be covinous and avoidable for Covin as well as a deed, and therefore that a fine or recovery levied or suffered of fraud to deceive Purchasors or Creditors will be void as to them as well as any other conveyance. So also a fine or recovery levied or suffered in execution or pursuit of an usurious contract may be void by the Statutes of usury as well as of feoffment or other conveyance by deed. But a fine or recovery shall not be said to be levied or suffered *per duress*, and avoided for that cause.

Co. 5. 38. See in exposition of Decds infra. The Conufance of a fine, and a Grant and Render therein shall be expounded and taken as a Charter or other conveyance between party and party, because it is a conveyance upon Record, and not as a writ of Judgment upon Record. And therefore if *A* and *B* by fine knowledg the Manors of *S*, *T* and *W* to be the right of *C*, and *C* doth render the Manors of *S* and *T* to *A* by one render, and after by another render limit 100 Acres, parcell of the Manor of *S* to *B*, this shall be a good Concord, and be expounded according to the intent of the parties. viz. That *B* shall have the 100 Acres, and *A* all the residue of the Manor.

37 H. 6. 5. If a fine be levied, *come ceo que il ad de son dons*, hereby a fee simple will passe without any word of heires. And so also it is in case of a common recovery.

Co. super Lit. 9. Predecessor's case. If the lands be limited in the Concord of a fine to *B* for life, and after to the children of *C* begotten, and *C* bath at the time of the

Covin.
Recovery

Usury.

Duress,

7. How the concord of a Fine shall be expounded and taken.

Deed.

Recovery.

Averment.

8. What persons shall be barred by a Fine, or a Fine and Non claime And in what time Or not. And how.

fine levied two daughters onely; in this case the sonnes and daughters that are born after shall take nothing by this fine. And no averment of intent will help in these cases. And yet an averment lieth upon a fine of the uses thereof and of no other matters as upon a Deed.

A fine at the common Law, or a fine without Proclamations was once a perpetual bar, to all persons that had right and no impediment at the time of the fine levied, and that did not claime within a yeare and a day after the execution of the fine by possession; but now this Law is changed, and this kind of fine will barre none but such as are parties and privies thereunto. But a fine by the Statute, or a fine with Proclamations is now much of the same virtue and force as a fine at the common law was; for by the Statute of 4 H. 7. it is provided, That every fine after the ingrossing thereof shall be proclaimed in the Court the same Terme, and the three next following Termes, foure several dayes in every Terme; which Proclamations so made, the fine shall conclude all parties, privies and strangers, except women covert, persons within 21 yeares of age, in prison, out of the Realme, or of *non sane memorie*, (being no parties to the fine) so as they or their heirs take their action or lawfull entrie within five yeares after these imperfections removed, Saying to all persons and their heirs (other then parties) the right, claime and interest which they have at the time of the fine, so as they pursue it by action or entrie within five yeares after the Proclamations. And saving to all other persons such right, title, claime and interest, as first shall grow or come to them after the Proclamations by force of any matter before the fine, so as they make their claim or entrie within five yeares after the same grow due, or if at that time there be any impediment as aforesaid within five yeares after the Impediment removed. And by the Statute of 32 H. 8. (which is an exposition of this Statute) it is provided, that all Fines with Proclamations levied according to 4 H. 7. by any person of 21 yeares of age of any land, &c. before the fine levied entailed to him that doth levy the Fine or any of his Ancestors in possession, reversion, remainder, or use, immediately after Proclamations had shall be a bar against him and his heirs, claiming onely by force of any such entail, and against all others claiming onely to the use of him or any heire of his body. By which Statute it doth appear that all the parties to the fine, Conusors and Conusees, whether they be femes Covert, men *de non sane memorie*, or others, (Infans onely excepted, who during minority may avoyd it) and whether they have a natural or civil capacity; and privies, *viz.* privies in blood, as heirs whether they be lineal or collateral, or privies in representation, as executors administrators; and all strangers also, *viz.* all others besides parties and privies that have or pretend any present right

Stat. 18.
Ed. 1. de
finibus
Stat. 34.
Ed. 3. 16.
Plow.
373. Stat.
4. H. 7.
ch. 34. 1
R. 3 ch. 7.
32 H. 8. c.
36.

or title (except women covert, and the rest that have impediment that doe make their entry or claim, or bring their action within five years after Proclamations had, and those persons excepted also if they make not their claim, &c. within five years after the impediment removed) all these are included, & so shut and closed up together; for their right is so extinct hereby, as they can never open their mouths or lift up a finger against it. Saving to all others, & such as have no present right at the time of the fine levied, and were excepted before such right, title, claim or interest as shall accrew to them after the Proclamations upon any trust, gift in taile, or other cause, before the fine levied, so as they make their claim, &c. within five years after their right first accrewed, if they have then no impediment, or if they have, within five years after the impediment removed.

For a more full understanding of which Statutes and this matter, these things in general must first be observed. 1. That the persons to be barred by a fine are. 1. Parties. 2. Privies. 3. Estrangers. The parties if they be of the age of 21 years. are bound for ever by the fine, and shall have no time to claim to preserve their right. The privies also, being heirs and executors to the parties and void of impediment at the time of the fine levied, or not, if they claim by the same title that their Ancestor had that levied the fine, are barred for ever by the fine, and shall have no time to claim to preserve their right. And therefore if my Father disseise my Grandfather of land, and then levy a fine of the land, and then my Grandfather die, and after my Father die, by this fine I am barred of the land for ever. And here note, that he that is a privy within the intent of 4. H. 7. is an heir within the Statute of 32 H. 8. *Et sic è converso*. And that privies or heirs in estate and blood, as he that is heir to whom the land doth or should descend, are within these Statutes, and shall be barred by the fine of their Ancestor of that land. And so also shall privies in estate that are not privies in blood, as where one hath land in burrow English, and levy a fine of it, hereby the youngest sonne is barred. So if one be tenant in taile to him and the heirs females of his body, and he levie a fine, having a sonne and daughter, hereby the issue female is barred, and yet she is not the heir of his blood. But he that is privy in blood only, and not in estate also, is not within these Statutes, neither shall he be barred by the fine; and therefore if lands be given to a man and the heirs females of his body, and he hath a sonne and a daughter, and the son levie a fine and die without issue this is no barre to the daughter; for however she be heire of his blood, yet she is not heir to the estate, nor shall need to make her conveyance to it by him. The strangers that are to be concluded by the fine, are either. 1. Such as have present right and no impediment, and these are barred within

Dier 3.
palmer, 7.
Iac. B. R.

Trin. 11.
Iac. Com.
B. Curia
in Will.
Godfreys
case.

five years if they make not their claim within five years after the Proclamations. 2. Such as have present right, but have impediment of infancy, &c. and these are barred if they do not make their claim within five years after the impediment removed. 3. Such as have no present but future right upon cause precedent, and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrew; or they have impediments, and then they are barred if they claim not within five years after the impediment removed. 4. Such as have neither present nor future right at the time of the levying of the fine by reason of any matter before the fine, but whose right groweth either entirely after, or partly before, and partly after the fine; and these are not barred at all by the fine, but they may make their claim, &c. when they will. And parties, privies, and strangers to fines that are barred thereby, are such as have natural capacities, or civil, for both these are barred. And therefore it is held, if such a Corporation as hath an absolute estate and authority of his possessions so as he may maintain a writ of right thereof, as Major and Communalty, Dean and Chapter, &c. levy a fine of their lands, they and their successors are barred presently; but if a Bishop, Dean, or Prebend, without assent of the Dean and Chapter, or a Parson and Vicar without assent of the Patron and Ordinary had levied a fine, this would not have barred the successor; neither will it barr now with their assent, for they are restrained by divers Statutes. So also such persons are barred by the fines that are levied by others if they make not their claim in time, as if one disseise a Corporation aggregate of land belonging to their Corporation, and after levy a fine of it with proclamations, and they doe not make their claim, &c. within five years, hereby they are barred. 2. Where the Ancestor is barred by the fine, there for the most part the heire is barred also. And therefore if tenant in taile be disseised, and the disseisor levy a fine with Proclamations, and the tenant in taile suffer five years to pass without claim, &c. hereby he and his issues are barred for ever, so that the heire doth suffer for the latches of his Ancestor. 3. The estates that shall be barred by the fine are estates by the common Law, or by Copihold, in fee-simple, fee-taile, or for life, or for years, the estates also of tenant by Statute, Elegit, and of Gardeins in Chivalrie and of Executors that have land untill debts and Legacies be paid. And therefore if one enter upon, and put out a Copiholder of land, and levie a fine thereof, and the Copiholder suffer five years to pass and make no claim, &c. the Copiholder and his Lord both are hereby barred for ever. And if a lease be made for years, and the lessor or another before entrie of the lessee levy a fine with Proclamations, and the lessee doth not make his claim, &c. within five years,

Plow 538.
337. 375.
378.

Co. 9. 105.

Co. 9. 104.
5. 124.

Plow. 378.
Bro. Fines.
123. Co.
5. 324.

Plow. Lord
Zou. hes
117 0

Dyer, 3.
Co. 3. 86,
91. Plow.
373.

Co 5. 124.
9. 106

years hereby the lessee is barred of his interest for ever. 4. The things whereunto these Statutes doe extend, are lands and tenements, and not a Rent or other profit appender out of the land, and therefore if I have a rent common, or Estovers out of land or a way over land, or power to sell the land, and a fine is levied of the land it self, and I doe not make my claime of my rent, &c. within five yeares, yet I am not hereby barred of my rent, &c. And for this cause it is, that if a tenant in antient demesne levie a fine of his land, and five years passe, the Lord is not hereby barred to avoid it, for herein he claimeth not the Land but his ancient Seigniorie. 5. The time in which they must make their claim, or bring their action that have present right and no impediment, is within five years after Proclamation had, and the time for them which have impediments is within five years after the impediment removed. 6. The time within which they must make their claim or bring their action whose right doth happen afterwards, if they have no impediment, is within five years after the time that their right doth accrew, and if there be any impediment, within five years after the impediment removed. 7. The persons whose right is saved and preserved are mentioned in the first and second saving of the Statute of 4 H. 7. and they are strangers and not parties nor privies. 8. They that have benefit by the first Saving of the Statute shall have none by the second Saving, for he that will be within the second Saving to have benefit by it must be. 1. another person. 2. The right must come and accrew to him first. 3. It must come to him after the fine and Proclamations. 4. His right must be upon some cause or matter before the fine. 9. No fine shall barre any estate in possession, reversion, or remainder which is not devested and put to a right at the time of the fine levied. And therefore if one levie a fine of my land whiles I am in possession of it, this fine will not hurt me. So if the tenant of the land, out of which I have a Rent or Common, &c. levie a fine of the land, this shall not barre me of my Rent or Common, for I am still in possession of this in the judgement of the Law. So if there be tenant for life, the remainder for life, or tenant in taile, the remainder in taile, and the first tenant in taile or for life do bargain and sell the land by deed indented and inrolled, and after levy a fine to the bargainee, in this case the remainders are not barred, albeit five years passe without claim; for the law in these cases doth adjudge them always in possession. So if I make a Lease for years of land rendering a rent, and a stranger levy a fine of the land, and the lessee for years payeth his rent to me duly, in this case I am said to be always in possession, and therefore am not barred by this fine of my reversion, So if there be a tenant by Copy or lease for life, the remainder for life, and the first tenant for life accept of a fine of the

Issue in
baile barred
by the fine
for his Ance-
or or some
other.

land with Proclamations and 5 years passe without claime &c. hereby he that is in remainder is not barred. So if one have a lease for years of land to beginn in *present*, and a fine levied of the land, and five years passe after the terme begin, it seemes this is no barre, because this estate is not put to a right. And for the further illustration of all these things see the examples following. If tenant in taile levy a fine of the land intailed with proclamations according to the statutes, this is a barre to the estate taile, wherein these things are to be known. 1. That wheresoever the issue doth claim by the same title, and must make his Conveyance to the lands by him that levied the fine, there the fine will barre him; and therefore if lands be given to the husband and wife in speciall taile, *viz* to them and to the heires of their two bodies issuing or the like, or the gift be to them and the heires males or females of their two bodies, or to them and the heires of their bodies with the remainder to the right heirs of the husband in fee, and the husband alone levieth a fine with Proclamations, by this the issue in taile is barred. And yet so as the right of the wife is saved so as she makes her claim &c. within five years after her husbands death. So if husband and wife tenants in speciall taile have issue and the wife die, and the husband marry another wife and have issue and levy a fine *sur cognissance de droit come coo &c.* and take back by the same fine an estate in speciall taile the remainder over &c. and die, the issue by the first wife is barred. So if tenant in taile be disseised, or make a feoffment in fee, and after levie a fine with Proclamations to the disseisor or to a stranger, the issues in taile are hereby barred for ever, the continuance of the possession in another notwithstanding. So if a gift be made to the eldest sonne and the heirs of his body, the remainder to the father and the heirs of his body, and the Father dyeth and the eldest son levy a fine with Proclamations and dyeth without issue, this shall barre the second son for ever, for the remainder descended to the eldest. So if lands be given to an eldest son and the heires of his body of his father (the father being then dead) and he levy a fine of this land, this will barre the younger brother. But if the issue in taile do not make his title by him that did levy the fine, there the fine will not barre, and therefore if my father be tenant in taile, and his brother disseise him and levy a fine, and he and my father dye, this fine shall not barre me as issue in taile, because I do not make my title to the land by him; but if I suffer five years to passe and do not make my claim &c. by this means I may be barred by the fine. And if the fine be levied of another thing then the thing it self entailed, As if the tenant in taile grant by fine a Rent Common, or the like out of the land entailed, this fine will not barre the issue. So if a Rent be entailed and the tenant

Stat. 4 H.
7. 31. H. 8.
Co. super
Lit. 373
17 Co. 9.
138. 140.
Dier 3.

Dier 354

Co. 3. 90.

Co. super
Lit. 371.

Curia rin.
3 Ja. Co B.

Dier 3.

Plow. 433.

in taile of the Rent disseise the terre-tenant of the land out of which the rent doth issue, and then levy a fine of the land, this is no barre to the issue of the Rent. 2. Albeit the fine be a double fine with a grant and render, yet it is within these Statutes, and will barre the issue in taile as well as a single fine, so as the grant and render be of the land it self and not by any profit apprender out of it. And therefore if husband and wife be tenants in special taile, and they levy a fine with Proclamations, and the Conusee grant and render the land to them and their heirs, this fine will barre the issue in taile. And if tenant in taile joyne with *I. S.* and levy a fine to a stranger, and the stranger doth grant and render the land again to *I. S.* for years, and to the tenant in taile in fee afterwards, the issue in taile is barred by this fine. So if there be tenant for life, the Remainder in taile, and lie in remainder in taile accept of a fine from a stranger, and grant and render to the stranger again for years with a remainder over, hereby the issue in taile is bound. If tenant in taile accept of a fine of the land entailed from a stranger, and then grant and render a Rent out of the land to the stranger by the same fine, this will not bind the issue in taile to pay the same Rent. If tenant in taile make a feoffment on condition, and die having two sisters inheritable to the taile, and one of them levy a fine with Proclamations *sur Release* to the feoffee of the whole, in this case it is doubted whether the other sister be barred of her half or not. 3. Albeit the tenant in taile dye before all the Proclamations be finished, yet when they be finished as they may be after his death, the issues in taile are bound by the fine; for howsoever by the death of the tenant in taile the right of the estate taile doth descend to the issue, yet when the Proclamations are passed, this right that doth descend is bound by the Statutes, and the issue cannot by any claim &c. save the right of the estate taile that doth descend unto him. 4. Albeit the issue in taile be within age, out of the Realm, under Coverture, *non compos mentis*, or in prison at the time of the fine levied, and the proclamations passed, yet the estate taile is barred by the fine. And therefore if *A.* be tenant for life of land, the remainder to *B.* in taile, the reversion to *B.* and his heirs expectant, and *B.* levy a fine to *C.* and his heirs, and hath issue and dye before all the proclamations are passed, the issue in taile being then out of the Realm, the Proclamations are made, and after the issue in taile cometh into the Realm and claimeth the remainder in taile upon the land, in this case the estate taile is barred for ever. 5. These Statutes do extend to fines levied by tenant in taile by Conclusion, and the issue shall be bound by the fine of their Ancestor unto whom they are privy in estate and blood, albeit *partes suis nihil habuerunt tempore finis*. And therefore if the issue in taile

3] C. 79 3.
85 super
Lit. 353.
Bro. fines
118. Dier
279.

Flow. 435

Dier 117.

3] Co. 3.
86. 87.
in Shelley's
Case.

4] Co. 3.
84. 91.

3] Co. 11.
50. Dier.
279. Flow.
435.

in the life of his Ancestor when he hath onely a possibility, As if there be grandfather, father, and sonne, and the grandfather be tenant in taile, and the father levy a fine of the land before the grandfathers death, and then the grandfather dye before the father, and after the father dye, in this case the issue is barred by this fine:

* so also if the grandfather survive the father. But in case of a collateral descent, If the collateral Ancestor die in the lifetime of his father without issue, this fine is no barre; but if he survive his father, *contra*. So if lands be given to the grandfather and his wife in speciall taile, and the grandfather dyeth and the father doth disseise the grandmother, and doth levy a fine with proclamations, the grandmother dieth and then the father dieth, in this case the sonne is barred. So if lands be conveyed in taile to a woman for her Jointure within the Statute of 11 H. 7. cap. 20.

and whiles she liveth the issue in taile doth levy a fine of the land, by this the issues inheritable to the estate taile are barred for ever. So if tenant in taile make a feoffment or be disseised, and after levy a fine with proclamations for a stranger, hereby his issues are barred for ever. So if tenant in taile die, and his issue before his entry (having a freehold in law only) doth levy a fine with proclamations, this shall be a barre to his issues and to his collateral heirs and brothers of the halfe blood. So if a tenant in taile have four daughters, and one of them levy a fine in the life of the father, this will be a barre to her issue for the fourth part of the land. But in these cases before and such like where the issue in taile doth levy a fine in the life time of the tenant in taile, the tenant in taile himself may after levy a fine of the land, and thereby barre his issue, and the Conusee also to whom his issue hath levied a fine, and therefore in all these cases it is supposed that the tenant in taile doth dye and suffer the right to descend to his issue.

If lands be given by will to one when he shall come to his age of twenty four years, to hold to him and the heirs of his body, and he after his age of twenty one years levy a fine of this land with proclamations, this is a barre to the issue in taile. If a disseiser make a gift in taile, and the donee make a feoffment to A. and after levy a fine with proclamations to B. that hath nothing in the land, this fine will barre the issues in taile, and they shall not avoid it by pleading that *partes finis nihil habuerunt &c.* but it is no barre to the disseisee, for he may avoid it by this Plea when he will. And *a fortiori* therefore, if a fine be levied by the tenant in taile that hath only an estate of freehold in remainder or reversion, its good, as if

A. be tenant for life, the remainder to B. in taile, and B. levy a fine, albeit this be no discontinuance, yet it is a barre to the estate taile. But if tenant in taile have issue a sonne and a daughter, and the sonne (living the tenant in taile) levy a fine, and dye without issue,

* Curia.
Tinn. 21.
Jac. Com.
B. Godfrey
& Wades
case. Dier
48.

Co. 3. 50.
51. 9. 140.

Plow. 434.
435.

Curia. 21.
Jac. Co. B.

Idem

Co. 3. 50.
51. 9. 140.

Co. 10. 50.
9. 141. 2.
50. 51.

Co. 3. 84.

Trin. 25.
Jac. Co. B.
Will. God-
frey versus
W. des
case.

Discontinu-
ance.

6] Co. 3.
94.

Per Pop-
ham et
Penner.
Inst. M. 39
40. Eliz.
B. R.
Co. 1. 76.
super Lit.
372.

Co. 10. 96.
2 Jac.
B. R.

issue, and then the tenant in taile dieth, by this the daughter and the estate taile is not barred. So if the younger sonne levy a fine in the life of the father, and then the tenant in taile die, this is no barre to the elder sonne. So if lands be given to a man and the heires females of his body, and he hath a sonne and a daughter, and the sonne doth levy a fine of the land, this is no barre to the daughter. So if tenant in taile have a daughter his wife being with childe of a sonne, and the daughter levy a fine, and after the sonne is born, this fine shall not barre the sonne, for these howbeit they be privies and heires to the blood, yet are not privies and heires to the estate.

6. Asbeit the estate passed by the fine be afterwards before all the proclamations had avoided, yet the issue in taile is barred by it. And therefore if tenant in taile discontinue in fee, and after disseist the discontinuee and levy a fine with proclamations to a stranger, and take an estate back by Render in the same fine, and the discontinuee before all the proclamations pass enter and claim and so avoid the fine, yet hereby the estate taile is barred. And if tenant in taile infeoffe the issue in taile and after disseist him and levy a fine, the issue enter, and after the proclamations pass, and after the issue in taile doth infeoffe the tenant in taile which levied the fine and dyeth, it seems this fine shall barre the issues in taile.

7. This is a barre to the estate taile and to the issues onely, and is no barre to him in remainder or reversion, and therefore when the estate taile is spent, this barre is at an end. And therefore if an estate be limited to *A.* and *B.* his wife and the heires males of the body of *A.* the remainder to *C.* and *A.* and *B.* have issue and *A.* dye and *B.* and her issue, or her issue alone levy a fine, this will bar the issues of the issues whiles there be any, but if they fail it will not barre *C.* in remainder, except he suffer five years to pass, and so be barred by his *non claim*. So if tenant for life and he that is next in the remainder in taile joyn in a fine, this is a good barre to the issues in taile for ever as long as that estate taile shall continue, but not to him that is next in remainder, nor to any other that shall come in of any remainder in taile or in fee nor to him in reversion.

If lands be given to *A.* and the heires males of his body, the remainder to *B.* and the heires males of his body, the remainder to the right heires of *A.* and *A.* doth bargain and sell this land by deed, indented and inrolled to *S.* and his heires, and after levy a fine of it *sur Co. usance de droit come ceo &c.* to him and his heires, by this the remainder to *B.* is not discontinued, but it is a barre to the estate taile by the Statutes, and causeth the estate of the bargainee to last so long as the tenant in taile hath issue of his body but if the fine had been before the bargain and failed, it had been a discontinuance of the remainder, but in neither case a barre to him in remainder, unless

Discontinu-
ance.

he

he suffer himself to be barred by his non claim within five years after his remainder happen to come in possession. 8 If there be tenant in taile the remainder to him in taile, and the tenant in taile levie a fine of this land, hereby both his estates are barred. *Et sic de similibus*. But all this notwithstanding, if lands be conveyed to a woman in taile for her joynture within the Statute of 11 H. 7. chap 20. and she levie a fine of this land, this will not barre the issues in taile. Or if lands be given in taile to any subject by the Kings own gift or provision, and the tenant in taile levie a fine, this fine shall not bind the issues in taile nor the King, but others it will barre; for these fines are not intended within, but excepted out of the Statute of 32 H. 8. but the King himself being tenant in taile of the gift of some of his Ancestors being subjects, may levy a fine of it to barre his issues in taile. And in all cases where a recovery will not bar the issues in taile, there a fine will not bar them.

8] Co.
super Lit.
372.

Bro. Fines
131. Co.
6. 55.
Dier. 4. Co.
super Lit.
372. Co.
8. 17. 73.

a Wife barred
by the fine of
her husband
or some other.

Albeit the fine of the husband and wife together of the wives land, or of the land of the husband and wife together, be a perpetual bar to her and her heires for ever, yet if the husband alone levy a fine with Proclamations of such land, and then he die, in this case she is not barred of her right, but if she doe not make her claim, &c. within five years after her husbands death she is barred of her right for ever, notwithstanding the Statute of 32 H. 8. And if one seised of land in fee marry a wife, and after make a lease of this land to A. for life, the remainder to B. in fee and B. levie a fine with Proclamations, and the husband die, and the wife doe not make her claime, &c. within five years after the death of her husband, hereby she is barred of her dower for ever; notwithstanding the estate for life in A. but if the remainder of B. had been put to a right at the time of the fine levied she might have avoided the fine by Plea. *Quod partes finis nihil habuerunt, &c.* And if the husband levy a fine of his own land and die, and his widow having no impediment doth not make her claim within five years after his death, hereby she is barred of her dower for ever. If a jointure be made to a woman after the coverture, and her husband and she levie a fine of it, hereby without question she is barred of her joynture in this land; but it is thought that this is no bar of her dower in the residue of the land of the husband, and especially that when the fine is *Sur connaissance de droit come ceo, &c.* If lands be given to a man and his wife in taile, the remainder to the right heires of the husband, and the husband alone levie a fine of this, this will not bar the wife except she suffer five years to pass after his death without making claim, &c. and therefore if the fine be to the use of the husband and his heires in fee, he may dispose it as a fee simple, and his issue hath no remedy.

Dier 72.
Plow. 373.

M. 18. Tac.
Co. B. in
Anne
Twists
case.

Dier 221.
Co. 2. 93.

Dier 358.

Dier 352.

If

Co. 9. 105.
3. 87.
Inper Lit.
698.

If a man disseise me of the land I have in fee simple, or fee taile, and after levy a fine of this land with Proclamations, and I do not make my claim, &c. within five years after the Proclamations had, hereby I and my heires are barred for ever of this land. And if I being such a tenant in fee make a lease for years, or be Lord of any Copyhold estate, and my lessee for years, or Copyholder in fee, or for life be ousted, and I thereby disseised, and the disseisor levy a fine, and neither I nor my lessee for years, or Copyholder do make any claim, &c. within the five years after the fine levied, hereby we are all barred for ever. And if one disseise me of land, and after make a lease for life of it, and then levy a fine with Proclamations, and I suffer five years to pass, hereby I am barred both of the reversion and of the estate for life also.

3. Disseise
and the like
barred by the
fine of the dis-
seisor, &c.

Flow. in
Stowels
case.

If tenant for life make a feoffment in fee, and the feoffee levy a fine with Proclamations, and he in reversion or remainder doe not make his claim, &c. within five years, hereby he is barred for ever.

Co. 3. 79.

If I pretend right or title to land, and enter upon it, and put him out that is in possession, and then I levy a fine with proclamations with an intent to barre him, and he doth not make his claim, &c. within five years, hereby he is barred for ever, albeit he had the true right and I no right at all.

Co. 3. 79.
Doct. &
St. 83.
895.

If I purchase land of H. and after perceiving my title defeasible, and that a stranger hath the right of the land, I do levy a fine to, or take a fine from another with Proclamations with intent and of purpose to barre him that hath right, and he suffer five years to passe, and doth not make his claim &c. hereby he is barred of his right for ever. And in these and such like cases there is no releif Equiry. to be had in equity See more in Numb. 11. *infra*.

Co. 10. 95.
9. 106.

If there be tenant in taile, the remainder in taile, and the tenant in taile bargain and sell the land by deed indented and inrolled, and after levy a fine with Proclamations to the bargainee *sur Conn-
sance de droit come ceo, &c.* in this case as to the tenant in taile and his issue this is a barre, but as to all others it is no barre, albeit they never make any claim, &c. So if tenant in taile levy a fine of his intailed land, this is a barre as to him and his issues, but as to all others it is no barre at all, and therefore he in remainder or reversion in their times may enter notwithstanding. So if lands be entailed to the husband and wife, and the heires of their two bodies, and the husband alone levy a fine of this land, this as to the husband tenant in taile and his issues is a barre, but not as to the wife, for she shall be tenant in taile still, and yet it seems she may not suffer a recovery of this land afterward. So if a man attainted of felony or treason levy a fine of his land, this as to the King and Lord of whom the land is held is void, and is no barre to their advantage

9. Where a
Fine shall be a
barre as to one
person, and
not to ano-
ther, or as to
one part of the
land, and not
to another.

Co. 9. 140.
142.

and

Recovery.

and title of forfeiture, but as to all others it is a good barre. So ^{7 H. 4. 44}
if one levy a fine of Lands in Ancient demesne and of other lands ^{F. N. B.}
together, this as to the lands in Ancient demesne is not good, nor ^{98. Plow.}
any barre at all, but as to the other lands it is a good barre.

10. The time
of claime, and
within what
time he that
hath right to
land must
make his
claime, &c. to
prevent the
barre of the
fine.

Parties
Privies

11. Estrangers.
That have
present right
and no impe-
diment.

By the ancient common law, he that had right, was bound to
make claim, &c. within a year and a day after the fine levied and
execution thereupon, or else he was barred for ever, but this barr
by *non claime* is now gone, and if such a fine without Procla-
mations be levied at this day, he that hath right may make his
claim at any time to prevent the barre, and avoid the force of the
fine.

Co. super.
Lit. 54
262.

Parties to fines void of impediment at the time of the fine levied
are barred of the land presently, and shall have no time to avoid
the same fine by entrie, claim, &c. And privies in blood, and privies
in representation claiming by the same title which their Ance-
stor that levied the same fine had, shall be barred by the same fine
presently, and that whether they have any impediment or not.

Stat. 1 R.
3. ch. 7. 4
3. 7. ch.
24.

Estrangers to fines (being all such as are neither parties nor privies)
who have right to the land whereof the fine is levied, and have no
impediment natural or legall, shall have time to make their claim,
&c. within five years after the fine levied and Proclamations had,
and no longer. And therefore if lessee for years, tenant by Elegit,
Stature, or a Copyholder in fee, or for life, be ousted, and he in
reversion disseised, they shall have but one 5. years between them
to make their claim, &c. and if they claim not within that time they
are all barred for ever, for they have all present right, and may
bring their action presently: but otherwise it is where the tenant
for life, and he in reversion be disseised, for in this case he in
reversion is not barred by the first five years after the fine levied;
for in that time he can have no action; therefore he shall have time
to make his claim 5. years after the death of the tenant for life.
If a disseisor levy a fine with Proclamations of the land whereof
the disseisin was, the disseisee must make his claim within the first
5. years after the Proclamations had, and if he happen to dye with-
in the five years, his heire shall not have 5. years more, but so
much time more as to make up the time incurred in his father or
other Ancestors time, 5. years, and albeit he be an Infant at the time
of his Ancestors death, yet he shall have no longer time. If a te-
nant in taile be disseised, and the disseisor levy a fine, the tenant in
taile or his issues must make their claim within the next five years
after the Proclamations passed, otherwise they be barrred for ever.
The like it is in the lachesse of him in remainder or reversion.
And if in these and such like cases, he that hath present right and
is without impediment bring upon himself any impediment, as if
being within the Realm at the time when the fine is levied, he do
after.

See the
Sta Plow.
H/4. Co. 9.
805.

Plow. 356
375.

19 H. 8. 7.
Plow. 324.
Dyer. 3.

Co. 100.

afterwards goe beyond the Sea, or the like, in these cases he shall have no longer time then the first five years after the proclamations had.

See the
statutes.
Plow. 339.
Dier 3.
Plow. 367
377.

Esstrangers to fines pestered with impediments of Infancy, Co-
verture, Madnes, Idiocy, Lunacy, Imprisonment, or absence out
of the Realm, at the time of the levying of the fine, and having
then any present interest or right, shall have five yearstime after
the infirmity removed to make their claim, &c. And therefore
an Infant regularly shall have time for five years after he come to
his full age to make his claim, &c. although he be in his mothers
womb at the time of the fine levied. And yet if my fathers bro-
ther disseise him, and levy a fine with proclamations, and a year
after the proclamations my father dyeth, and after and within
five years my uncle dyeth, in this case I by reason of my infancy
shall have only so much time to avoid the same as at the death of
my father remained to come of the five years next after the pro-
clamations, and not a new five years, because I claim by the same
title that my father had. So if my father, or other ancestor be dis-
seised, and the disseisor levy a fine with proclamations, and my fa-
ther or ancestor dye within five years after the proclamations, in
this case I shall not have a new five years, but only so much as
remaineth of the old five years to make my claim, &c. Madmen

a That have
present right
and impedi-
ment.
Infant.

Plow. 366.
735.

and Lunaticks (being strangers to the fine) shall have the like time
to make their claim, &c. as Infants have; and yet if this infirmity
happen after the fine levied, and before the last proclamations
be made, these persons are not bound to the first years, but shall
have five years time after they be cured of their maladies.

Non sane me-
morie.

Plow. 375.
739.

Women Covert (estrangers to the fine) shall have five years time af-
ter they be discoverd to pursue their right. But if a *feme sole* (estranger
to a fine) hath present right and after the fine levied she take
a husband, and so five years passe after the proclamations had, in
this case she is barred and shall have no further time to claim.

Women Co-
vert.

Plow. 360.
366. 375.

Esstrangers to fines imprisoned at the time of the fine levied shall
have the same time and liberty Infants have, but if such imprison-
ment happen after the time of the fine levied and before the last
proclamation made, it seemeth they shall have five years after the

q. *finem ab impri-*

Imprison-
ment.

Plow. 366.

enlargement: And estrangers to fines being out of the Realm at
the time of the levying thereof, shall have five years time after
their return to enter or claim, &c. But if they be in *England* at
the time of levying of the fine, and after go beyond the Seas,
and suffer the five years after the proclamations to pass, in this
case they shall have no longer time except they be sent in the
Kings service and by his commandement. And if the party be
beyond the Sea at the time of the fine levied, and never return but
dye there, it seems in this case the fine will not barre his heire at all.

Out of Eng-
land.

note.

Esstrangers

si Tho.
Cottons
case. 47
Eliz.

3. That have
divers defects.

Strangers to fines that have divers defects and infirmities, as Infancy, Coverture, non-sanity of minde, imprisonment, absence out of the Realm, to avoid fines, shall have time for five years after the last of the infirmities removed. But if they have divers impediments, and they be all once after the proclamations made wholly removed, and after they fall into the like again and dye, in this case their heires shall not have a new five years, but the first five years begun in their Ancestors time immediately after the first impediments so removed shall proceed, and *non-claims* of their heires during all the residue of the said five years, bindeth them as their said Ancestors should have been bound thereby, if they had remained void of such impediments during all the said five years.

Plow. 375.
Dier. 133.

4. That are
without im-
pediment ha-
ving future
right upon
cause prece-
dent.

Strangers to fines that have no present but a future right, and that such as groweth wholly before the Proclamations, if they be void of impediment shall have five years time after their right, title, claim or interest first groweth, remaineth, descendeth or cometh to them after the proclamations. And therefore if a Mortgagee be disseised, and the disseisor doth levy a fine with proclamations, and the five years pass, and after the Mortgagee payeth or tendreth the money, in this case he shall have time for five years after the tender or payment of the money to make his claim, &c. So if a man levy a fine of his land whereof his wife is dowable, she shall have five years after her husbands death to make her claim, &c. and not be bound by the five years after the fine. So if tenant in taile levy a fine with proclamations, and after the five years dyeth without issue, the donor shall have five years after his death without issue to bring his *Forme-*

Plow. 373.
Dier. 124.

Plow. 374.

don. So if lessee for life levy a fine, or make a feoffment in fee and the feoffee doth levy a fine, in this case he in reversion or remainder shall not be bound by the next five years after the fine levied, but he shall five years next after the death of the tenant for life, and if he dye within the five years, his heirs shall have only so much time as to make up the time before his death five years. So also is the law if lessee for life be disseised, and the disseisor or a stranger levy a fine, in this case he in reversion or his heirs shall have five years after the death of the tenant for life, and shall not be bound to the next five years after the time of the fine levied. So if tenant in taile in possession levy a fine and dye without issue, in this case he in the remainder shall have time for five years after the death of the tenant in taile without issue; and if he make not his claim, &c. in that time, he and his issues are barred for ever. The same law is for him in reversion or the donor, if there be no remainder. And if tenant in taile discontinue in fee, and the discontinuee levy a fine with proclamations, and five years doe pass, and the tenant in taile dieth, in

Co. 78.
Plow. 373.
374.

Plow. 374.
Co. 9 305.

Plow. 374.
19 H. 8, 7.
Co. 3. 87.
84 Dier 1.

Co. 3. 87.

this

this case his issue shall have five years after the Descender to bring his *Formedon*. But if tenant in taile discontinue rendring rent and dye, and the issue accept the Rent (which doth bar him for his time) and then the discontinuee levieth a fine and dyeth, in this case the issue of the issue shall not be barred by the five years after the fine, but shall have five years after the death of the issue. And if one *de non sane memorie*, make a feoffment, and the feoffee levy a fine, and then the feoffor die, in this case the heire shall have five years after the death of his Ancestor, and not be bound by the five years next after the fine levied.

Estrangers to fines that have future right upon any cause precedent being affected with such impediments when the right first accreweth, shall have 5 years after the impediment removed to make their claim, &c. And therefore infants that are born, or in their mothers Wombe when such right doth happen to them, women Convert, mad men, Lunaticks, prisoners beyond the Seas, shal have this time. As if a man have issue a son and a daughter, and the son doth purchase lands and die, and the daughter entreth as his heire, and is disseised by A. who levieth a fine, and 5. years claim without claim, and ten years after the father hath another son who is heire to his brother, he shall have in this case a new full 5. years after he come to his full age, for he is the first unto whom the right descended after the Proclamations. But if a stranger to a fine to whom a remainder or other title first accreweth after the fine, doe not pursue his right within 5. years, hereby he and his issues are barred for ever. And in like manner if the first issue in taile to whom the title of the taile first accreweth neglect to make his claim, &c. within the first 5. years after his title accrewed, hereby he is bound for ever, and the whole estate taile also. And if one abate after the death of a tenant in fee-simple, and make a feoffment upon condition, and the feoffee levy a fine, and 5. years pass without any claim made by his heire, hereby the heire is barred for the present; but if afterwards the condition be broken, and the Abator enter, then the heire may have an assise of Mortdancer against the Abator, or enter when he will.

Estrangers to fines that have neither present nor future right at the time of the levying of the same fines by reason of any matter before the fines levied, whose right groweth entirely before the Proclamations, or partly before and partly after, may make their claim, &c. when they please. As if a father dye seised of land, his elder son being possessed, and the younger son entreth and is disseised, and a fine with Proclamations is levied, and then the elder son is dearraigned, in this case it seems he is bound to no time. So if a tenant cease one year, and then a fine with Proclamations is levied, and after the tenant ceaseth another year, the Lord may

3. That have future right and impediment.

6. That have no right for any cause before the fine.

30 EL.

Flow. 374.

See the Statutes Flow.

166. 367. Dier 3. Flow. 358.

Flow. in Stowels case.

have his *Cessavit* twenty years after the Proclamations.

7. That have
future rights
by divers
titles.

And estrangers to fines that have several future rights by divers titles growing at several times, it seemeth shall have severall five years to make their claims, &c. commencing from the several times that their titles do first accrew unto them. As if tenant for life, the remainder in fee, make a feoffment in fee, and the feoffee levy a fine with Proclamations, and he in the remainder suffer the 5. years to pass, in this case he is bartoed of his entrie upon the alienation for the forfeiture, but it hath been held that if the tenant for life die, that it shall have another 5. years time to bring his *Formedon* in the remainder. So if the husband make a feoffment of his wives land to another upon condition, which is broken, and he levieth a fine of this land, and the husband hath issue by his wife and dieth, and the first 5. years pass, and then his wife dieth, hereby he is barred of the title by the condition, but he shall have 5. years more to make his claim as heire to his mother. But if lands be given to *H* for the life of *A*, the remainder to *B* for life, the remainder to *H* in fee, and *H* is disseised, and after the disseisor levy a fine, and 5. years pass, in this case *H* is barred both of his present and future estate, and shall have no further time to make his claim, &c. and yet if *Cessavit quo vie* and he in the mean remainder die, *H* shall have another 5. years to make his claim to preserve his remainder. In like manner it is if land be given to *H* for the life of *A*, the remainder to him for the life of *B*, the remainder to him for the life of *C*, and he is disseised, and the disseisor levyeth a fine with Proclamations, in this case, some say *H* for his present right shall have 5. years by the first saving of the Statute, and 5. years after the death of *A*. by the second saving of the Statute. If one disseise a feme sole, and after marry her and have issue by her, and the husband is disseised before marriage or after, and then a fine is levied with Proclamations, and the husband dieth first, and afterwards the wife dieth within the 5. years, the issue being of full age, the 5. years pass, hereby he is bound as heire to his father, but he shall have 5. years more after the death of his mother to make his claim, &c. *Quando duo jura in una persona concurrunt æquum est ac si essent in diversis.*

Plow. 357.
367. 372.

Plow. 357.
368. 372.

11. How a
fine shall en-
nure and
work.

Where there is a precedent agreement amongst the parties, as a feoffment or the like, there the fine shall not pass any thing, nor work by way of Estoppel, but onely by way of corroboration, and shall be guided by the precedent agreement. And therefore if a feoffment be made to two and their heires, and after a fine is levied to them two and the heires of one of them, this shall enure as a release, and shall not alter the estate, but if there be no precedent agreement it shall work as it may.

Co. 10. 96.
2. In the 1
Lord
Cromwells
case.

x If I enfeoffe *A* of certain land in fee rendering rent with condition of re entrie for non payment of rent, and by indenture at the

Dier 157.
Viz Estop-
pell 211.
Co. 2. in
Cromwells
case.

same.

same time covenant to levy a fine of the same land to the feoffee, to the uses and conditions in the deed of feoffment, and after a fine is levied *sur consauance de droit cum eo &c.* Accordingly, in this case this fine shall enure as a fine *sur release*, because the Conusee hath the fee before, and it shall not enure as by way of estoppel, albeit it be a fine *sur consauance de droit cum eo &c.* And therefore the rent and condition shall remain in this case, and not be extinct.

Estoppel. Extinguishment.

See before at Numb. 6. part. 2. F. N. B. 30 f. Strat. 23. El. chap. 3.

A fine may be avoyded for many causes, as by the death of the parties after the consauance before the recording of it, or by covin in the procuring of it; Also it may be avoyded for other causes, as for some error in the proceeding in the suing out of the fine, and this is done by writ of error (but this error then that shall ~~not~~ make a fine voidable must be notorious, because the thing is done by consent, and it is a rule in Law *Consensus tollit errorem.*) And by this means if the husband and wife levy a fine, and both of them be within age, whiles either of them be within age, they may avoid the fine as against them both. But if there be tenant for life and he in remainder in taile being an Infant, and they two levy a fine, and he in remainder reverse it for infancy, this shall not avoid the fine as to the tenant for life also. A fine also is and may be sometimes avoyded, or at least lose much of force by the claim, entry, or action of him that hath right to the land: for if the estate contained in a fine be once within 5. years after Proclamations lawfully defeated, the Party hath thereby lost his whole estate both against him which did reverse the same and against all others which had right or title paramount and made no claim within the five years, albeit he which doth bring the action have no judgment and execution within seven years after the Proclamations. In like manner if there be a tenant for life, the remainder for life, the remainder in fee, and the first tenant for life alien, and the alienee levy a fine with Proclamations, and the second tenant for life claim, or enter, &c. this doth make void the fine both against him, and against him in remainder also: for it is a rule, That any one that hath any estate in possession or reversion which will be barred by the fine when it is levied, may make a claim or entry to prevent the barr of the fine. As tenant for his own or for anothers life, tenant for years, he in reversion or remainder after an estate for life or years, a Copiholder, or the Lord, a Gardian in nature, or nurture, may avoyd a fine. And this they may doe for themselves and others, and for others without authority precedent, or assent subsequent, and the claim of one of them in this case shall avail the other. And by authority also any other man may make a claim, entry, &c. in this case for him that hath right, and so he may doe also without any authority precedent, if the party for whom he doth it, doe afterwards agree and assent unto it, But a

1. Where a fine may be avoided, or not. And how. By a writ of error.

2. By a claim, entry, &c. And by whom a claim, &c. may be made

argu.

Stranger of his owne head (unlesse perhaps it be for an Infant) cannot make such a claim or entry to prevent the barre of a fine, except he that hath the right doe give him authority before it be done so to doe, or doe agree to it after it is done. And therefore if a stranger of his own head will make an entry or claim in ro-land whereof a fine is levied whereunto I have right, and he doe it to my use, and I do not agree to it within the five years, this entrie or claim will not avoid the fine. And yet it was held by Just. *Dodridge, M. 2. Car. B. E.* that if a stranger enter into my name and to my use that have the right, that this doth vest the estate in mee before agreement, and I shall be said to agree untill I do disagree.

3. By a plea.

A fine also is, and sometimes may be avoided by plea, as by Averment of the continuance of seisin of the Land in another, at, and before the time of the fine levied, and that *partes finis nihil habuerunt tempora levationis finis*, and then he must shew in whom the estate was. As if lessee for yeares, or a disseisee levy a fine to a stranger that hath nothing in the land, or *A* be disseised by *B*, and *B* be disseised by *C* and *B* levy a fine to *D*, or one that hath a right of a remainder onely, or a disseisor make a gift in taile, and the Donee make a Peoffment to *A*, and after levie a fine to a stranger that hath nothing in the Land. But this Plea it seemes neither parties nor privies, albeit they be issues in taile, may have at this day, but strangers onely, and therefore in the last case the disseisor and not the issue in taile may avoyd this fine by this plea. But if a Collateral Ancestour of whom the issue in taile doth not claim the land levie such a fine, the issue may by this plea avoyd it. It seemes also the issue in taile may have this plea to a fine *sur release* onely.

Stat. 4. H.
7. c. 24.
Co. 3.
14. l. 28.
Dyer 334.

Also, there is a plea by which (as it seems) a fine hath been avoydable, which in effect is nothing else but an averment of seisin still in the demandant or plantiffe or his heires before, at, and after the time of the fine levied. And this plea (as it seems) no man may have at this day but the issue in taile onely to avoid a fine levied *sur Grants & Render*, by the Ancestor in taile, and not to avoid a fine levied *sur conscience de droit come ceo que il ad de son dons &c.* And a feme Covert to avoyd a fine levied by her husband alone.

Co. 3. B.
Dyer 334.
290. Stat.
27. E. 1. c.
11.

4. By a Vcar.

If there be two of one name, and one of them levy a fine of the land of the other, or a stranger levy a fine in the name of him that is owner of the land; in both these cases the fine may be avoided by pleading the speciall matter. And yet some hold that in this case the party hath no remedy but by action of disceit.

34 A. 6. p.
19 H. 6. 41.

A fine also is and sometimes may be avoyded by the sentence of a Court, when it appeareth to be gotten and obtained by some notorious fraud or practice.

And

And now it is high time we come to the second kind of common assurances made by matter of record, viz a Common Recovery.

CHAP. III.

Of a Common Recovery.

Co super
Lit. 154.
See the
Preamble
of the stat
of 23 H.
8. cap. 10.
23 Eliz. c.
3. Doct. &
Stud. 41.
West. Sym
tit. Reco-
very.

A Recovery in general is the obtaining of any thing unjustly taken or detained by judgement or triall of Law. And it is either a common recovery which is such a recovery as is used for a common assurance of land, or other recovery which is not used as an assurance of land. And the common recovery that is used for the assurance of land is nothing else but *filio juris*, or a certaine forme or course set down by Law to be observed for the better assuring of lands and tenements to men. And this is somewhat after the example of the recovery upon Title, which is without consent and contrary to the will of him against whom the same is had: for there is in this a colourable suit, wherein there is a demandant which is called the recoverer, and a tenant which is called the Recoveeree, and one that is called to warrant upon a supposed warranty, which is called the Vouchee.

1. Common
Recovery.
Quid.

Recoverer.
Recoveeree.
Vouchee.

The common recovery is sometimes with a single voucher; which is when the writ is brought against him that is to pass the land immediately, and he doth vouch over the common vouchee. And sometimes it is with a double voucher; which is when the writ is brought against another to whom he that is to pass the land hath aliened it, and he doth vouch him that is to make the assurance, and he doth vouch over the common vouchee: and this is the surest way, and the safest kind of recovery. In this formality of a common recovery the course is, that by agreement of the parties a real action is begun by a writ of entry brought by him that is to have the land assured against him that is to make the same assurance if it be with a single voucher; or if it be with a double voucher against him to whom he that is to make the assurance hath aliened the land. And in this suit, the recoveror that doth bring the action doth surmise that the tenant against whom the writ is brought hath no right to the land, but that the recoveror hath right thereunto, and that the tenant came to it from such a stranger whom the demandant doth name. And to this the tenant doth appear in person or by Attorney, and then doth enter into defence of the land, but in pleading doth vouch to warrant, i. doth allege that he bought the land of *J. S.* a stranger, who in the conveyance thereof bound himself and his heires to warrant and make good the title to him or them to whom it is conveyed, and thereupon he prayeth that *J. S.* may be called in to defend the title, and then he

2. *Quotplex.*

3. The man-
ner and order
of suffering a
Common Re-
covery.

See the
places be-
fore. Co.
1. 94. 10.
43. 45.

Recovery in
value or *pro*
Rata. Quid?

is allowed by the Court to call in *I. S.* to say what he can for the justifying of his right to the land before he so conveyed it: And hereupon *I. S.* doth appear and make shew as if he would defend the title, but doth pray a further day may be assigned him to make his defence, which being granted him by the Court, at the day appointed he by agreement, covin and assent of the parties doth not come in but make default: And thereupon the land is to be recovered by him that brought the writ against the tenant, and he is left for his remedy to *I. S.* upon his warranty, and accordingly judgement is given by the Court that the demandant or recoveror shall recover the land demanded against the tenant, and that the tenant shall recover so much land of *I. S.* of his own land in recompence for the land recovered from him, which he ought to have warranted and defended but suffered to be lost. And this recovery over is called a recovery in value or *pro Rata*. But if the recovery be with a double voucher, or a treble voucher, *I. S.* is upon his appearance to call or vouch to warrant *I. D.* and to alleadge in the same manner as the tenant doth, and so pray that *I. D.* may come in, and thereupon *I. D.* doth appeare and make default: And so if there be more vouchers; and then there must be several recoveries over in value against every one of them; but he that is the last vouchee is alwaies the common voucher, who is one of the cryers of the Court of Common Pleas, a man not worth any thing, and one that hath no land to render in value upon the supposed warranty. And by his devise grounded upon the strict Principles of law the first tenant doth willingly let goe the land for the assurance of the Purchasor, and yet in truth hath no recompence over because the vouchee hath no land to render in value. And by this means if one have an estate taile in lands which he is desirous to sell or to convert into an estate in fee simple, the same is commonly done, for the tenant in taile doth cause the purchasor or some friend of his to bring a writ of entry against him for this land, and he appeareth to the writ, and in pleading saith that the land came to him or his Ancestors from such a man or his ancestors who in the conveyance bound themselves to warrant it. And thereupon that man is called in, who doth appear and make default, and thereupon Judgement is had against him in manner as aforesaid. Or if he would have the recovery with a double voucher, then he by fine, feoffment, or deed of bargain and sale inrolled discontinues the land, and then causes the recoveror that is to have the land to bring this writ of entry against the discontinnee, and he doth vouch the tenant in taile, who doth vouch over the common vouchee, and so it is done; and by this the estate taile that the tenant in taile hath or had is barred and bound, for that it appeareth now he had no power to enlarge the land whereunto he had no just title,

and

F. N. B.
134. Co.
9. 6.

and besides he shall recover recompence over in value, and this is adjudged in law to goe in succession of estate as the land should have done, which is the reason why the recovery is a barre to all that are in remainder and reversion aswell as to the issues in taile.

Experiencia.

And in the suffering of these recoveries the tenants and vouches do appear most commonly in person in Court, and so the recovery is finished in the Court presently without more doing, but sometimes they wil not or cannot appear in person, and then they doe use to appear and suffer the recovery by Atturney. and in that case there must be a Conufance for a warrant of Atturney taken to authorize the Atturney or Atturneys in this manner if it be for a treble voucher.

Warrant of Atturney.

West Sym. ubi supra.

Glouc. ff. *Pres. AS & B. uxori ejus quad iusto & c. redd. CD, Maritimum de N cum pertinen. & c. que clam. esse ius & hered. suam & inque iidem A & B non habent ingress. nisi post disseisinam quam HH iniuste & sine iudicio fecit prefat. C infra 30. Annos jam ultim. elapsos & c. ut dic. & c.*

Glouc. ff. *A S & B po lo. suo W W & RR Attornat. suos conjunctim & divisim versus CD de placito terre.*

Glouc. ff. *MM gen. quem A S & B vocant ad Warrant. po. lo. suo H & LL Attornat. suos conjunctim & divisim versus CD de placito terre.*

Glouc. ff. *G W gen. quem MM voc. inde ad warrant. po. lo. suo RG & RS Attornat. suos conjunctim & divisim versus CD de placito terre.*

Co. 10. 43.
Co. 1. 1.

And in these cases to make two atturneys at the least, and to give them an authority joynly and severally that if one of them should be hindered from the recovery be suffered, the other may have power to dispatch it. And these warrants of Atturney for the suffering of recoveries are to be knowledged and certified in the same manner as the confuances of fines knowledged in the Country are, save onely that Recognifances for warrants of atturney for recoveries may be taken by any judge of the Court of of Common Pleas or any Serjeant at Law without a *D dimiss. Potestatem*. But if any others take it they use to doe it by a speciall *Dedimus Potestatem*, which is to command the commissioners therein named to come to such persons and to take the names of their Atturney or Atturneys in the suit, and to certifie the same into the Chancery under their Seales such a day. And if there be a woman covert that is to make the Conufance, it seems she is to be examined as in the case of the Conufance of a fine. And when this is done the Recoveries may be suffered by the Atturneys without the personall appearance of the parties. And this is as good a recovery as the other which is suffered by the persons themselves appearing in Court, but that it will require longer time for the perfection of it, for in this

Dedimus Potestatem.

Examination.

case, there must goe forth a *Summons ad Writum* which must have nine Returnes ere the recovery can be perfected, and by that time one of the parties may be dead. And when the recovery is thus suffered by the parties in person or by their Attorneys, the same is to be entred by some one of the Clerks of the Court of Common Pleas upon the Roles of the same Court there to remain upon Record. And herein there must go forth a writ of Execution called an *Habere facias seisinam*, which is sent to the Sheriff of the County where the land doth lie to put the Recoveror in possession of the land (except a recovery be of a reversion of land after a lease for years of it, in which case the reversion shall be in the recoverors by a claime without any writ.) And this writ the Sheriff doth return as executed according to the Contents thereof, albeit in truth he never doe any thing upon it. And after this all the same proceeding is to be Exemplified by the Clarke of the same Court.

Habere facias seisinam.

4. The use, nature and operation of it.

Forfeiture.
Averment-
Covin.

A recovery being matter of Record is much of the nature of a fine, and such a thing as whereof the law taketh notice; for it is now become a formall and orderly manner of assurance of lands and one of the Common Assurances of the Kingdome, or a common way and means to passe lands from one to another. And therefore if a tenant for life suffer such a recovery of his land it is a forfeiture of his estate, an use may be averred upon it as well as upon a fine; and it may be avoyded for covin as well as any other kind of conveyance. But it is of special use and hath a special virtue to bar and binde estates in taile and all the remainders and reversions thereupon. And because many of the Inheritances of the Kingdome depend upon this assurance, and it is oft times the greatest purchase for their money, therefore it hath much strength from the Law at this day. And therefore the Law will not endure it shall be disputed against, for *Communis error facit jus*. And hence it is that it shall not be avoyded for small errors, for it is another rule of Law, *Consensus tollit errorem*. And if a recovery be suffered by a tenant in taile, hereby he hath not onely discontinued, barred and destroyed the estate taile, and so defeated himself and his issues the former owner of the land, and all the remainders and reversions thereupon that should take place after the estate taile, whether they be in esse or contingent onely, but also all former estates, Leases and Charges made by him in remainder or reversion: for as when the estate taile in possession is not barred by a recovery, the Estates in reversion or remainder are not barred, for *Quod non in magis propinquo non in magis remoto valebit*; So it is e converso, where the estate taile in possession is barred by the recovery, all the remainders and the reversions, conditions, charges, incumbrances and estates dependent upon it are barred also, except it be

Co. 5. 41.
10. 37. 39.
3. 5. 6. 41.
41. Doct. 1
& Stud.
41. 49. 52.
Itat. 12
Eliz. cap.
5. 23. ca. 3.
7. H.
8. cap. 4.

Co. 1. 61.
25. Doct.
& Stud.
49. 44 Ed.
3. 21.

in some speciall cases where the remainder or reversion is in the King. And therefore if *A* be tenant in taile the remainder to *B* in taile, the remainder to *C* in fee, or *B* and *C* doth make a lease for years of the land, or grant a rent charge out of the land, or enter into a Statute, or the like, or grant the remainder or reversion upon condition, and after *A* doth suffer a common recovery of the land, and after dieth without issue, in this case the recoverer shall hold the land discharged of all these estates and charges in remainder. But otherwise it is, if *A* himself make a lease, or enter into a Statute, and then suffer a common recovery of the land, in this case this recovery doth not avoyd but affirm the lease or charge, for whereas it was before avoydable by the issue in taile or him in remainder or reversion, now it is good against them all, and the recoverer also shall hold it charged and subject to the lease and charge of the tenant in taile. This kind of Assurance therefore is in some respects better then a fine, for a fine will barre the heire in taile, but not him that is in the remainder, or reversion, but a recovery will barre them all.

West Sym.
ubi supra.
Co. super
Lit. 372.

In every good and binding common Recovery these things are requisites:

1. That there be a demandant, a tenant, and a vouchee as the efficient causes thereof, for if either of these be wanting it is not a compleat recovery. And therefore if a common recovery be had against the tenant in taile without a voucher, this is voyd. And for this it is to be known that such persons and by such names may be demandants, tenants, and vouchees in recoveries, as may

5. What shall be said a good Common Recovery. And who shall be barred and bound thereby, or not.

note the Difference of a Woman co-vert.

suffered by an Infant appearing by his Guardian is good, and will bind him and all others. So also a recovery had against a woman that hath a husband being joyned with her husband will bind her and all others: 2. That there be land demanded as the matter, and that the thing be demandable. And for this it is to be known that of such things and by such names as a writ of Covenant for the levying of a fine may be had, a writ of entry for the suffering of a recovery may be had, save onely it may not be *de fessato, stagno piscaria, un^o Carucat, terre, estoveriis, homag^o, fidelitas, de serviitiis faciendis, de bovata Marisci, de scton terre, de gardino, cottagio, crofto, virgata terre, fodina minere, mercatu, nec de superiori camera*, And yet of some of these also it may be by other names.

Also a recovery may be had of a rent, common advouson, Franchises and the like, but not of any annuity. 3. That it be had and suffered in that order and form as law requireth, *viz.* that there be a writ of entry brought, and appearance of the tenant *in fait*, a voucher, and an appearance of the tenant in Law the vouchee, Judgement and Execution in a manner as aforesaid, for if there be any substantiall defect in these things the recovery may be thereby avoided

96 *Blount*
case. Ho-
barts Rep.
375. Paic.
9. Jac.
Earle of
Newports
case ad-
judged.
Co. 10. 13.
Plow. 515.
2) Doct. &
stud. 52.
Co. 5. 40.
41. West
ubi supra.

Co 3. 3.
stat. 23 E-
liz. C. 3.

avoided by writ of Error, but if it be onely in forme it will not hurt.

4. That there be a lawful tenant to the Precipe. *i.* that the writ of entrie be brought against one that at the time of the writ brought is tenant of the freehold, either by right. *i.* that hath an estate for life at least in the land, or by wrong *i.* that is a disseisor of the land demanded and whereof the recovery is had. And therefore in this Case the course is where the land to be recovered is in possession and a Fine and a recovery is had of it together, the Fine is sued out first, for this doth make the Conusee tenant of the freehold of the land, and then the recovery is had against him. And when the recovery is to be had of a reversion, and that there is an estate for life in being of the Land whereof the recovery is to be had (for an estate for yeares or any such like estate will not hinder the suffering of a recovery) there the course is to get a conditionall Surrender for the tenant for life of his estate to him in reversion or remainder, to the end that he may be perfect tenant of the Inheritance, and then the writ of entrie may be brought and the recovery had against him, for if a writ of entrie be brought against a stranger, and he vouch the tenant in taile in possession of the land, and so a recovery is had; or if there be tenant for life of land, the remainder or reversion to another in taile, or in fee, and a stranger doth bring a writ of entrie against him in the remainder or reversion, or against a stranger who doth vouch him, and so a recovery is had; these recoveries are not good. And yet if the writ be brought against the tenant of the land and a stranger that had nothing in the land together, and so a recovery be had; this recovery is good enough. And if a disseisor make a gift in taile of the land to another, and the writ is brought against him, and he vouch the disseissee, and he vouch the common vouchee; this is a good recovery. 5. That it be in such a case as is not prohibited by some Statute Law; for if the King give any of his own land whereof he is seised, or cause to procure another in consideration of money or other land to give the lands whereof he is seised, in taile to any of his subjects or servants in recompence of their service, or the like, the remainder to the King in fee simple, or fee taile; such estates in taile cannot be barred by a common recovery: And therefore if such a tenant in taile shall suffer a recovery of such land it is void, and it will neither barre the issues in taile, nor any of them in remainder, nor the King. But if the King make such a gift in taile keeping the reversion to himself, and after doth grant the reversion to another; in this case the tenant in taile may suffer a recovery, and barre the estate taile and the reversion also. And where a subject by the Kings provision doth make such a gift in taile, and then doth grant the remainder to the King for life or yeares onely; in this case the estate taile, remainders

Prerogative.

Dyer 252.
Co. super
Lit. 46. 36.

Co. 3. 6. su.
per Lit.
46. Lit.
Bro. Seq.
919. Plow.
514. Doct.
& Stud.
49. See
infra.

Stat. 34 H
8. ca. 30.
Co. super.
Lit. 371.
25. 16. Co.
8. 77. 78.

and

and reversion also may be barred by a common recovery. So in other cases where a subject doth make a gift in taile, the remainder to the King in fee; this estate taile may be barred by a common recovery. And therefore if there be tenant in taile, the remainder or reversion in fee to another, and he in remainder or reversion by deed indented and inrolled doth bargain and sell his remainder or reversion in fee to the King; or if one covenant to stand seised to divers uses in taile, the remainder to the King in fee, in these cases the estates and the reversion and remainders depending thereupon may be barred by a recovery. So if a man make a gift in taile, the remainder in fee, and he in the remainder doth grant his remainder to another for life, the remainder to the King in fee on condition, the estate shall be void upon the tender of 20 s. in this case the estate taile, and the reversion also and condition thereupon may be barred. So if the Duke of *Lancaster* had made a gift in taile and the reversion had descended to the King; this estate taile might have been barred by a recovery, so if Prince *H.* son of *H.* 7. had made a gift in taile, the remainder to *H.* 7. in fee, which remainder by the death of *H.* 7. had descended to *H.* 8. in this case the tenant in taile might have barred the estate taile by a recovery. And yet if the King make a gift in taile, the remainder in taile, or grant the reversion in taile; in these cases a common recovery may not be suffered to bar the intaile, remainder, or reversion. And if the husband for the advancement of his wife in jointure, and the preferment of the heires of their two bodies, make an estate in taile to him and his wife and the heires of their two bodies, and the wife after her husbands death alone by her self or with any other husband suffer a common recovery of the land whereof this estate is made; this recovery will not bar the estate taile. But if in this case the recovery be suffered by the heire in taile, or by the heire and his Mother together, it is a good recovery. And therefore if *A.* be seised of land in fee and he make a feoffment in fee, to the intent that the feoffee shall reconvey it to him and his wife and the heires males of his body, and this is done accordingly, and they have issue a son, and she surrender, or make a forfeiture, and he enter and suffer a recovery; this is a good recovery and bar to the estate taile: or if the writ be brought against the mother, and she vouch the heire in taile, and so a recovery is had, this recovery will bar the estate taile. And howsoever at the Common Law a recovery against a tenant for life with a voucher upon a lawfull warranty and a recovery in value was a bar to him in remainder or reversion, and there was no remedy in this case, yet at this day it is otherwise. And therefore if tenant in taile after possibility of issue extinct, renant by the courtesie, or any other tenant for life doe suffer their lands to be recovered from them by

COVIN

Silt. 11 H.
7. cap. 20.
Co. 3. 58.
61. 59.

Stat. 14.
Edw. 2. cap.
8. Co. 15.
62. 10. 43.
45. 3. 6.

Forfeiture.

cōvin and agreement either as immediate tenants or as vouches upon fained titles, without the assent, and to the prejudice of him in remainder or reversion; such recoveries are void, and will not bar the remainders or reversions, but are forfeitures of the estates of such tenants for life. Inſomuch that if tenant for life be made tenant in ſait to the writ, or tenant in law upon the voucher, and ſo a recovery be had, as if tenant for life make a lease for years, and the leſſee for years doth make a feoffment in fee, and the feoffee doth ſuffer a common recovery in which the tenant for life is vouched, and he vouch the common vouchee; theſe recoveries will not bind the reversions or remainders. But there is no provision made at this day to preſerve the reversion or remainder expectant upon an eſtate taile, nor to avoid a recovery of the tenant for life, where he in the next remainder is agreeing and aſſenting to it. And therefore if there be tenant for life, the remainder to *A* in taile, the remainder to *B* in taile, &c. with divers remainders over, and the tenant for life doth ſuffer a common recovery, in which he doth vouch *A*. who doth vouch the common vouchee; in this caſe this is a good recovery and doth bar the eſtate taile, the remainders, and reversion alſo. And if one be ſeiſed of land in fee and have two ſonnes, *A* by his firſt wife, and *B* and a daughter by his ſecond wife, and he deviſe the land to his wife for her life, the remainder to *B* his ſonne in taile, and the reversion of the fee deſcend to *A*, and the writ of entry is brought againſt the tenant for life, and ſhe vouch *B*, and he doth vouch the common vouchee, and ſo a recovery is had without the aſſent of the heire in reversion; this is a good recovery and a bar to all the eſtates in poſſeſſion, remainder and reversion. And if a writ of entry be brought againſt the tenant for life, and he make default after default, and then the next in remainder in taile is received, or he pray in aid of him in reversion or remainder, and then they vouch over, and ſo a recovery is had; this is a good recovery and a bar to all the eſtates in remainder and reversion. But if the writ of entry be brought againſt the tenant for life and him in the remainder in taile together, and they vouch the common vouchee, and ſo a recovery is had; this will be no good recovery to bar the eſtate taile. And if Spiritual perſons, as Biſhops, Deanes, Parſons, and ſuch like, ſuffer a recovery of their Eccleſiaſtiſtical lands; ſuch a recovery is void and will not bind the ſucceſſor. But if it be not in ſome ſuch prohibited caſe as beſore, and the recovery be had and ſuffered by and between ſuch perſons, and of ſuch things, and in ſuch a manner as aforeſaid, in ſuch caſes albeit there be in truth no warranty made upon which the voucher is had, and albeit there be nothing to be recovered in value, for that the vouchee hath no land to recover over in recompence, and albeit that no execution be done in the life

See before
in fines &
Co. ſuper
Lr. 44.
Plow.
Manxels
eſſe. Co.
10. 373.
L. 94.
Plow.
357.
not.

life time of the party against whom the recovery is had, yet is the same regularly a perpetuall barre to the parties against whom the same is had and their heires, of all the estates they have in fee simple, fee taile, or for life in them, and against all them in remainder or reversion, and their remainders and reversions that are depending upon the estates: with this difference; The recovery with the single voucher doth not bar any estate but such as the tenant in taile hath in possession at the time of the recovery had, so that if the tenant in taile be in any other estate, as by disseisin, or the conveyance of the disseisor, or the like, this estate is not barred. But the recovery with the double voucher doth bind and barre all interests, estates and titles that the vouchee hath at the time of the entry into the warranty. All which is further illustrated by the examples following. If the writ of entry be brought against the tenant in taile, and he vouch the common vouchee, and so a recovery is had; this recovery with a single voucher is a good recovery; and a barre to the estate taile if it be then in possession and not put to a right, and to all the remainders and reversions depending thereupon. So if lands be given to *A* in taile, the remainder to the right heires of *B* (*B* being then living) and the writ of entry is brought against the tenant in taile, and he doth vouch over the common vouchee, this is a good recovery and a barre to the estate taile and the remainder also. But if the tenant in taile be disseised, and then suffer a recovery with a single voucher; or the disseisor make a new estate in taile to the tenant in taile, and then the tenant in taile doth suffer a recovery with a single voucher; or if the tenant in taile make a feoffment in fee of land, and then take back a new estate to himself from the discontinuee in taile or in fee, and then doth suffer a common recovery with a single voucher, by this recovery, the entaile is not barred. But by a recovery with a double voucher in these cases the estate taile is barred. And therefore as where the tenant in taile doth levy a fine, make a feoffment, or bargain and sell the land by Deed indented and inrolled, and the writ is brought against the Conusee, feoffee, or bargainee, and he doth vouch the tenant in taile, and he doth vouch the common vouchee, this doth barre the estate taile and the remainders and reversion depending thereupon: So if in these cases the Conusee, Feoffee, or Bargainee doth make a new estate in taile to the Conusor, Feoffor, or bargainor, or he dissaile the Conusee, Feoffee or bargainee, and then levie a fine, make a Feoffment, or bargain and sell to another against whom the writ of entry was brought, and he vouch the tenant in taile, and he doth vouch the common vouchee; by this recovery the first and second estate taile and all the remainders and reversions depending thereupon are barred. So if Lands be given to *I. S.* and the heires males of the body

Co. 3. 59.
lit. Bro.
Sect. 38.
Plow.
Manuels
case.
23 Ed. 4.
23. 13. Ed.
4. 1.

Co. 1. 5.
20. 37.

Co. 1. 135.
136. 3. 59.
13 E. 4. 19
13 E. 4.
Co. 10. 45.

Co. 9. 5.
Plow. in
Manuels;
case. 18.

note

of

of his wife engendred, and he hath issue a sonne, and after his wife dyeth, and he discontinue and take an estate to him and the heirs females of the body of his second wife, and after discontinue again and take an estate to him and the heirs females of his own body, and after discontinue again, and the writ of entry is brought against the last discontinuee, and he doth vouch the tenant in taile, who doth enter into the warranty generally; and voucheth the common vouchee; this is a good recovery and a barre to all the estates in taile, and the remainders and reversiones also. And if *A* before the Statute of uses had been tenant in taile, and had made a feoffment in fee to *B* and he and *B* had after made a feoffment to *C* to the use of *A* and his wife and the heirs of their two bodies, and then she had died, and after *A* had entred upon *C* the feoffee, and made a feoffment to *W* in fee, against whom *I S* had brought a writ of entry, and he had vouched *A* the tenant in taile; this had been a good recovery and a barre to all the estates. And if lands be given to husband and wife and the heirs of the body of the husband with remainders over to strangers, and the husband alone doth discontinue the whole land by fine, feoffment or bargain and sale by deed indented and inrolled; and the writ of entry is brought against the discontinuee, and he doth vouch the husband alone without the wife, and the husband doth vouch the common vouchee, and so a recovery is had; this is a good recovery for the whole land and a barre to all the estates in taile and remainder and reversion, but not to the estate of the wife for her life after the husband's death. But if lands be given to the husband and wife and the heirs of their two bodies with remainders over to strangers and the husband alone discontinue, and the recovery is suffered as in the last case; it seems this is no barre to the estates in taile or remainder or reversion for any part of the land. And yet if lands be given to *AS* and *TD* in taile, and *TS* discontinue the whole, and the writ of entry is brought against the discontinuee; and he vouch *TS* alone; this is a good recovery for the one half of the land and a barre to all the estates. And if lands be given as before to husband and wife and the heirs of their two bodies, and the writ of entry is brought against them both, and they vouch the common vouchee, or the husband alone doth discontinue, and the writ is brought against the discontinuee, and he vouch the husband and wife both, and they enter into the warranty and vouch the common vouchee, and so the recovery is had; these are good recoveries for the whole, and a barre to all the estates in taile, and to the estate of the woman and to all other estates. And where Lands are given to a man and his wife and the heirs of the body of the wife; or to the wife and the heirs of her body, and the writ of entry is brought against the husband and wife, and they vouch the

co. 3 s. 6.

33

Husband and
wife.

Lit. Bro.
37.

Plow. 314.

Co 3. 5. 1.
12 B. 4. 14.

Co. 3. 6.

Curia
Mic. 18.
Jac. B. R.
So was it
held by
most of the
Judges in
the case
between
Pell and
Brown.

2 (cc. 99)

the common vouchee; these are good recoveries and will bar the husbands and wives, and the estates in taile, remainder and reversion. And where a man hath land in which his wife hath a Jointure, or to which she will have title of dower after his death, if the writ of entry in this case be brought against them both & they vouch the common vouchee and so a recovery is had, this recovery will bar them both: But the husband alone without her cannot bar her of any such estate by a recovery, for she may falsifie and avoid it after his death. And if lands be given to husband and wife and the heires of the body of the husband, and the writ of entry is brought against the husband alone, and he vouch the common vouchee, and so a recovery is had with a single voucher; this is no good recovery of any part of the land, nor bar to any of the estates albeie the husband do survive the wife. And yet if lands be given to two others, and the heires of the body of one of them, the remainder over to a stranger, and the writ of entry is brought against one of them, and he vouch the common vouchee, and so a recovery is had, this is a good recovery and a bar to all the estates for the one halfe of the land. If lands be given to *A* in taile, the remainder to *B* in taile, the remainder to *C* in taile, the remainder to *D* in fee, and *A* doth make a feoffment in fee, and the writ of entry is brought against the feoffee, and he doth vouch *B* (being him in the second remainder in taile) to warranty, and he doth vouch the common vouchee; this is a good recovery and a barre to the second estate taile, and all the remainders and reversion depending thereupon; And yet it is no bar of the first estate taile which *A* hath. If the writ of entry be brought against a Mortgagee and he doth vouch the common vouchee, and so a recovery is had; this is no good recovery to bar or bind the Mortgagor, but that he may enter upon the condition broken. So if one give lands to *B* and his heires so long as *C* shall have heires of his body, and *B* doth suffer a common recovery, and vouch the common vouchee; this is no good recovery to bar the donor of the possibility, for in both these cases he that is to be barred hath no remainder or reversion, but an interest or possibility which cannot receive a recompence in value. But if in these cases the mortgagee vouch to warranty the mortgagor, or *B* the donee vouch the donor, and so they vouch over the common vouchee, and so the recovery is had; these will be good recoveries to bar both them and their heires for ever. And if one have an estate in fee simple determinable on a Limitation or a Condition, as if lands be given to *A* and his heires untill *B* pay to him 100*l*. and then that it shall remain to *B* and his heires, and *A* in this case doth suffer a common recovery, and vouch the common vouchee; it seems this is no bar to *B* and his heires, but that upon payment of the 100*l*. he shall have the land. So if

one

one by his will devise his land thus, I give unto *A* my son and his heires for ever my land in *W* paying 20 l. to *B* when *A* shall come to 21 years of age, and then that *A* and his heires shall have it for ever; and if *A* shall dye without heires of his body, *C* being then living, that then *C* shall have it to him and his heires for ever, and *A* pay the 20 l. to *B* at his full age, and then suffer a recovery of the land; this is no bar to *C* of his estate. But here it must be noted that in the cases before where it is said that a recovery is void, it is meant as to the heires and them in reversion and remainder; for as to the parties themselves that doe suffer the recovery the same is for the most part good and doth bind them by way of Estoppel and conclusion. And it must be noted also that a stranger that hath right to the land at the time of the recovery suffered is not barred at all by the recovery or by his laches of *non-claims*, &c. as in the case of a fine.

Co. 3. 5.

6. The remedy of Recoveries against the Lessees for Rents and services and upon wast done.

The recoverors in common recoveries, their heirs and assignes shall have the like remedy against lessees for lives and years of the land recovered, their Executors or Assignes by distress, avowry, or action of debt for the rents and services reserved upon their leases that shall be due after the same recoveries had: And also like actions for waste done after the recovery had: And like remedy upon a disturbance in a Presentation to an advowson, and in like manner and forme as the lessor should or might have had if the same recoveries had never been had, albeit the same lessees do never Attain to the same recoverors. And if a man make a lease for years to begin at Michaelmas reserving rent, and before Michaelmas he suffer a recovery; in this case the recoveror shall distrain for this rent which the lessor before the recovery could not distrain for. But if the recovery had not been had he might have distrained.

Stat. 7. H.
8. cap. 4.
Dier 31.
Co. super
Lit. 104.

7. Where a Recovery may be avoided, Or not. And by whom. And how. Fauxifier de Recovery.

A recovery may be defeated, frustrated and avoided (which is called the falsifying of a recovery) in part or in all for many causes, as for that there is some gross and substantial Error in the manner of the proceeding; but a recovery is not avoidable for false or incongruous Latine, rasure, enterlining, misentering of any warrant of Atturney, misreturning or not returning of the Sheriffe, or other want of forme in words, and not in matter of substance, because it is done by the consent of the parties. Or it may be avoided for that he against whom the writ of entry is brought, is not tenant of the freehold by right or wrong at the time of the writ brought, as when the writ is brought against a stranger that hath nothing in the land, and he doth vouch the tenant in taile in possession of the land. Or a recovery may be avoided for that he that hath the estate and the right, is neither party nor privy to the recovery, as when the writ of entry is brought against a disseisor, and he vouch a stranger that hath nothing in the land; or a recovery is had against the

Stat. 23.
El. cap. 3.
Co. 5. 40.
21 H. 8.
cap. 15. Co
super Lit.
46. 104.
Co. 3. 78.
Dier 249.
Co. 3. 4. 1.
62. 110.
315.

the husband alone of the land whereunto his wife hath title of dower. Or a recovery may be avoided for that another hath some estate in the thing whereof the recovery is had at the time of the recovery suffered, as when there is a recovery had of land whereof there is a lease or estate for years by Statute, Elegit, or the like. Or it may be avoided for that the recovery is had by covin, as when it is suffered by tenant for life to disinherit him in reversion, or when it is gotten by some undue practise and sinister dealing, for in this case it is sometimes made void by a *Vacat* or sentence of a Court. And where a recovery is avoidable or reverfable for any of these or such other like causes, it must be avoided by him whom it doth concern that is barred and bound by the same recovery that should have had the land if the same recovery had not been, and not by any other whom it doth not concern. As if an erroneous recovery be suffered by tenant in taile; in this case his issues, or if they faile, the next in remainder or reversion shall defeat it. So also if the land be recovered against a stranger; the tenant in taile shall avoid it; And if the land be recovered against a disseisor, the disseisor shall avoid it; And if the land be recovered against him in reversion or remainder, the tenant for years by Statute or Elegit shall avoid it: but in these last cases they shall falsifie and avoid it during their particular estates onely. So also the wife shall falsifie the recovery suffered by her husband alone as to her title of dower only and no longer and further. And he in the reversion or remainder shall falsifie and avoid the recovery suffered by the tenant for life either in the life time of the tenant or afterwards. But neither he in reversion or remainder, or any one by or under him, or any other can falsifie a recovery suffered by the tenant in taile in possession, except it be for some such cases as before. And the recoveror himself cannot falsifie a recovery. So neither can a Gardian, or a tenant of a Manor, as if one hold land of a Manor, and a stranger recover the Manor by a fained title; a tenant of the Manor cannot falsifie this recovery. And in all these cases where a recovery is avoidable and a man hath power given him to falsifie, he must doe the same sometimes by writ of Error, as in the case of an erroneous proceeding; and sometimes by pleading and the setting forth of the special matter, as in the case where the tenant is not tenant of the free hold; or when the recovery is had by covin against the tenant for life, or the like; and sometimes by the shewing and setting forth of the practise to the Court, and a motion made that a *Vacat* may be made upon the Judgement for the causes alledged.

And thus having done with the Comon Assurances that are made

by matter of record we come to the Common Assurances that are made by matter of *Fait*, viz. by Deeds and Instruments of writing in the Country, wherein we must stay a while upon the learning of Deeds in general, and from thence we shall descend to the particular kinds of Deeds.

CHAP. IV.

Of a Deed.

1. A deed.
Deed.

A Deed is a writing or Instrument written in paper or parchment sealed and delivered, to prove and testify the agreement of the parties whose deed it is, to the things contained in the deed.

Terms of the Law.
Co. super
Lit. 35.

2. *Quintuplex*.
Indenture.
Deed Poll.

All deeds are either Indented, or Poll. The deed indented (which is that which is called an Indenture) is when the paper or parchment is cut and indented. And it is designed to be a writing containing a Conveyance, bargain, contract, covenants or matter of Agreement between two or more, and is indented in the top or side answerable to another that likewise doth comprehend the self same matter. And this is so called because it is so indented, for albeit it be called an indenture and begin in these words. *Hec Indentura*, &c. yet if it be not actually indented it is no Indenture. And of the other side if it be not so called or these words be omitted, yet if it be indented it is an Indenture. And this was anciently called *Charta cyrographata vel Communis*, because each party had his part. The deed poll is that which is plain without any indenting when the parchment or paper is polled or cut even. And this was anciently called *charta de una parte*. And this is single and but one. which the feoffee, grantee, or lessee for the most part hath. The deed indented is also sometimes Bipartite. i. of two parts, when there are two parties and two parts of the deed. And then commonly the feoffor, grantor or lessor hath the one part, and the feoffee, grantee or lessee the other part. And sometimes it is Tripartite. i. when there are three parties and three parts, and then commonly each party hath a part of the Indenture. And sometimes it is Quadripartite, &c. And according to the parts they doe seal interchangeably one to another. And among these parts the part sealed by the feoffor, grantor or lessor is said to be the principal or original, and the rest are called but Accessory, Counterparts or Copies, and yet all of them in law doe make up but one entire deed. These deeds also are some-

Terms of the Law.
Co. super
Lit. 229.
143. 38
H. 6. 25.

Counterparts.

Lit. ced.
871. 37.

times in the first person, *2s Novaveritis &c. me A B &c. dedi & concessi &c.* And albeit it be an indenture so made yet it is good enough. And sometimes they are made in the third person, as *Has Indentura testatur &c. quod idem A B &c. dedit & concessit &c.*

* The deed Poll is usually made in the first person, but if it be made in the third person it is good enough. There are divers other distinctions of Deeds, for some are Publick that doe concerne Countries, some of the Prince. And some are private between particular persons, and those private persons or Subjects. And these only are intended here. And of these some are Absolute, and some Conditional: some are inrolled, and some not inrolled: some concern the realty, and some the personalty: And some are mixt. And some of these also contain matter of Grant, or Gift, amongst which feoffments, gifts, bargaines and sale, Grants and Leases are the chiefe. And some of them containe matter of discharge, as Releases, Acquittances, and Defeasances, and such like. And some of them contain other matter, as Confirmations and such like. Or as others distinguish, some of them are Constitutive and making, and some are remissory or liberatory. And the first sort are some of them creating, i. such whereby any estate, property or obligation not having essence before, is newly raised and created, as the first grant of a Rent, Common, way &c. Estate taile, for life, years, &c. And some of them are conveying, i. such by which estates, properties and the like being already created are conveyed to others, as feoffments, bargaines and sales grants over or assignments, surrenders and the like. Those that are of the last sort are such as doe describe and testifie some precedent contract for a duty or fact to be paid, performed or done, released or discharged, of which sort are all Acquittances, Releases, and other such like matters of discharge.

But here by the way, two things are to be observed. 1. That there may be and are divers other kinde of Deeds besides those which are named before, for every agreement put in writing sealed and delivered becommeth a Deed. And Attournments, Exchanges, Surrenders, Partitioners, Authorities, Commissions, Licences, Revocations, and the like, are usually made, given, done and granted by Deed. And there are divers other instruments concerning Merchants and other affaires; if therefore any of these bee done by deed such a deed is for the most part subject to the rules of deeds herein laid down. 2. Albeit that feoffments, gifts, bargains, leases, Attournments, Exchanges, Surrenders, and such like things may in divers Cases be as well made and done without as with a Deed, yet if a man will make his claime to any thing given or granted by such feoffment, gift, &c. by Deed, the Deed must be such a Deed, as is a good and perfect Deed by the rules herein after laid down.

* Bro. Ob.
lig. 51.
Co. super
Lit. 35-36.
West.
Symb. lib.
1 part 1.
Sec. 46.

See West.
Symb. 1.
part.

Note.

3. The parts of a deed.

In every deed or writing there are two parts considerable.
 1. The external or material part. 1. The parchment or paper, wax and writing. 2. The internal or intellectuall part 1. the sence, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers deeds, as feoffments, grants, leases and the like, there are certain formall or orderly parts which make up the whole, of which the law doth take special notice, as, 1. The Premisses, the office whereof is to rightly set down the name of the feoffor, grantor, lessor, &c. feoffee, grantee, lessee, &c. and to comprehend the certainty of the thing granted or leased. And herein in some deeds there is also a recital of some things, and in some deeds an Exception of some part of the thing granted before by the deed. 2. The *Habendum*, the office whereof is to name again the feoffee, lessee, &c. and set forth what estate he shall have and for what time he shall hold the thing given or granted. 3. There is set down and expressed upon what termes and conditions the estate of the thing granted shall be held. And therefore there is sometimes contained therein a *Tenendum*, to set forth by what Tenure the grantee shall hold the land granted. 2. A Reservation or *Reservendum*, to set forth by what Rent he shall hold the land. 3. A Condition. 4. A Warranty. 5. Covenants. 6. The Conclusion after this manner, *In cuius rei testimonium* &c. wherein is set forth the date of the deed, containing the day, moneth and year, the stile of the King or year of our Lord. And all these are sometimes contained under the Premisses and the *Habendum*.

Co. super.
 Lit. 6. 229.
 a. 3.

4. The nature of a deed indented and a deed poll, with the difference that is between them.

All the parts of a deed indented in a Judgment of Law doe make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutuall deeds of either party, and either party may be bound by either part of the same. And the words of the Indenture are the words of either party, And albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they doe more properly belong to him: for every word that is doubtfull shall be applyed and expounded to be spoken by him to whom they will best agree according to the intent of the parties; and they shall not be taken more strongly against one or beneficially for the other, as the words of a deed Poll shall. * If therefore A by indenture enfeoff B upon condition and then doth enter for the condition broken, in this case it hath been held that A in his pleading may shew forth the deed that he himself sealed, and that this is sufficient. And therefore also it is thoug' t that an Indenture made in the first person is as good in Law as an Indenture made in the third Person when both parties

Plow. 134.
 38 H. 6.
 24. 25. Lit.
 Sect. 370.
 9 H. 6. 35.
 35 H. 6. 34.

11 H. 7.
 23 per
 Brian.

Lit. Sect.
 have 371.

have to this put to their Seales, for if an Indenture made in the third Person or in the first person, mention be made that the grantor onely hath put to his Seale and not the grantee, then is the indenture only the deed of the grantor, but when mention is made that the grantee also hath put his Seale to the indenture, it shall be said to be the deed of them both.

Finches
Law. 109.

And although both parts of the indenture are but as one part, yet the deed of the grantor is as the Principal, and the other is not but a Counter-part And therefore if the lessor only seale and not the lessee, yet it is as good as if both had sealed, and if there be any difference between the Parts, the Counter-parts shall be made to agree with the principal, and it shall be deemed the misprision of the Clerk.

Flow. 434.
411.

This deed is the strongest kind of deed of the two, for this worketh an Estoppel. i. doth bar and conclude either party to say or except any thing against any thing contained in it, for if a lease be by indenture, both parties are concluded to say that the lessor had nothing in the land at the time of the lease made, so that if the lessor hap to have the land after by purchase or descent, the lessee may enter upon him by way of conclusion, and the lessee by estoppel shall be forced to pay his rent. But it is otherwise of a deed poll, for this is commonly but of one part which is sealed by the feoffor, lessor, &c. only. And this shall be expounded to be the sole deed of the feoffor, lessor, &c. and the words therein contained shall be said to be his words and shall bind him only, and be expounded altogether in advantage of the feoffee, lessee, &c. and against the feoffor, lessor &c. and this doth not work any Estoppel against either party. But if a deed be indented or poll, and there be therein reciprocal Covenants between them from one to another, albeit there be but one part, yet if each of them seale it and deliver it the one to the other, this is good for both parties, and each of them that can get the deed into his hand to shew or plead, may take advantage thereof against the other. And in this case the deed is usually kept by one indifferent between them both.

Estoppel.

Trin 28
El. Co. B.
per. Cur.
am. Co.
super Lit.
443.

See Grant
Infra.

Note here first of all, that some deeds are void from the beginning and do never take effect, and amongst these some are absolutely void and void against all persons, and some are void only to some purposes and against some persons. Some also that are not void from the beginning are notwithstanding voidable, and that sometimes by the party himself that made them or any others, and sometimes by others and not by himself. And some deeds are good in their first creation and well made at the first, but become void by some matter *ex post facto*. And this may be either by an extrajudicial act, as rasure, or the like, or by a judicial

s. When and where a deed shall be said to be good and sufficient. And when and where not, but void or voidable *ab initio*.

A vacat of a deed.

Things requisite to make a deed good.

act, *i.* when by the sentence of a Court a deed is damned and made void, which is called a Vacat of the deed.

To the making of every good Deed, containing any agreement these things are requisite. 1. Writing. *i.* That it be written in parchment or paper, and that the agreement be legally and formally set down, and be sufficient in Law for the composition and frame of the words. And this is called the legal part, the Judgment whereof belongeth to the Judges of the Law. 2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that all these be set down by sufficient names. 3. Reading. *i.* That if it be an illiterate man that is to seale the deed, and he desire to heare it read, that it be truly read or the contents thereof truly declared to him. 4. Sealing. *i.* That the deed so written be sealed by the party or some other by his appointment for a further testimony of his consent thereunto.

5. Delivery. *i.* That the deed so written and sealed be delivered by the party or some other by his appointment as his deed. And these last things being matters of fact are to be tryed by Jurors. 6. That the ground, foundation, end, and purpose of making the deed be good and not against the Law. Otherwise in most of these cases the deed is void *ab initio*. Also in some cases to perfect the contract and make the conveyance of the thing intended to be passed thereby good, some other ceremonies or complements are requisite, as Inrollment, Livery of Seisin, Attornment, otherwise the deed in part at least becommeth fruitless and vaine. For a deed may be void, either for that the writing is not in parchment or paper; or being so, is not legally and formally drawn; or being so, there doth want a person able to give or make, or capable to have, or take, or a thing to be contracted for; or if so, for that it is not duly sealed and delivered; or if so, for that it is not truly read at the time of the sealing and delivery; or if so, for that it is made void by some special law, as being made upon an usurious Contract, by duresse, or the like. Or it may at least in part lose his force afterwards by neglect of inrollment, Livery of Seisin, or Attornment in cases where these things are requisite.

7. In respect of the writing of it.

Every deed well made must be written. *i.* The agreement must be all written before the sealing and delivery of it: for if a man seale and deliver an empty peece of paper or parchment, albeit he doe therewithall give commandement that an obligation or other matter shall be written in it; and this be done accordingly yet this is no good deed. 2. This writing must be in paper or parchment, for if an agreement be written on a peece of wood, linnen, the barke of a tree, a stone, or the like, and this be sealed and delivered; this is no good deed. But it may be written in

Co. super Lit. 225.
35-36 Co.
2. p. 5.

Perk. Sec. 149. 137.

See infra.

See infra.

Perk. Sec. 137. &c.

See infra.

Perk. Sec. 118. Co. super Lit. 171.

3] Co. super Lit. 229. F. N. B. 122. Lit. 27 H. 6. 9. Co. 2. 3.

any

any language, or in any hand And therefore it is held that a deed written in French or Latine, and in Text, Court, or Roman hand, is as good as a deed written in English and in a Secretary hand. And albeit the writing be besides the lines, or the lines be written crooked, yet this will not hurt the deed And if there be any Alteration, raisure, or enterlining made in any part of the deed before the delivery of it; this will not hurt the deed. But in such cases it is policy to make a *Memorandum* of it upon the back of the deed, and to give the witnesses notice of it; for otherwise if it be in any place material, as in the name of the Grantor, Grantee, in the limiting of the estate, or the like, and especially if it be in a deed poll, the deed is greatly suspicious: 3. The matter written must be legall and orderly for manner and matter. 4. There must be words sufficient to set forth the agreement and bind the parties, for a deed may be void and lose his vertue in all or part for repugnancy, uncertainty, and divers other matters (whereof see in exposition of Deeds *infra*.) But it is not material whether the deed be in the First, or in the Third person so as the words be aptly applyed. For if a deed Poll be in the Third person *viz. Quod presens scriptum testatur &c. quod idem A dedit & tradidit &c.* Or an Obligation be in the Third person, *viz. M. quod I S debet* ID 201. &c. these are good deeds notwithstanding the Statute of 38 E. 3. cap 4. which is meant onely of Obligations made beyond the Seas, So if the words of a deed indented run in the First person, it is as good as if it were in the Third person. Neither is it necessary that the English or Latine whereby it is made be true and congruous, for false and incongruous Latine or English seldome or never hurteth a deed for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.* Neither is it necessary that every deed, have all the parts of a deed before set down, as Premisses, *Habendum*, &c. for a deed may be good without *Habendum*, warranty, Reservation or Covenant. And a deed is good albeit these words in the close thereof *In cuius rei testimonium Sigillum meum apposui* be omitted, and albeit there be no mention made in the same that the deed was sealed and delivered, so as in truth it be duly sealed and delivered and the sealing and delivery can be proved. Also a deed is good albeit it mention no time or place of date or making, or have a false date. 1. be dated at one time and delivered at another, and albeit it have an impossible date, at the 30 of February or the like, for anciently untill the time of E. 2. and E. 3. the deeds had no date, because the Law was then held to be that if a deed were dated before the time of memory, it was not pleadable except it were of Record, but it might have been given in evidence. But he that doth plead such a deed without any date, or with such an impossible date must set forth the time when it was delivered.

Perk Sect.
123. Perk.
Sect. 155.
Co. super
Lit. 225.

3 Co.
super Lit.
225.

Fitts Fait.
& feoff-
ments. 5.
Dier 6.

Co. 5. 127.
10. 133.
See Oblig.
Numb. 3.

Co. super.
Lit. 6.

Co. 2. 5.
Dier 19.
Kelw. 70.

Co. 2. 5. 5.
117. Dier
28. Perk.
Sect. 120.
Co. super
Lit. 6.

2. In respect
of the persons
parties there-
unto and
matter
therein.

The second thing required in every well made deed is, That the person making it be able to give, grant, make, or doe the thing contained in it, that the person to whom it is made be capable of the thing to be given, granted, made or done thereby, for if it be made by, or to any such persons as are disabled, as Infants, Aliens, women Covert, Persons attainted of Treason or Felony, Idiots and such like, it will be void in all or part. But any person naturall male or female, or polittique, as sole Corporations, or Corporations aggregate of many, Ecclesiasticall or Temporall, not disabled by law may give or take by deed. Also there must be some matter whereabout the contract may be conversant. It is therefore said that in every grant there must be Grantor, Grantee, and a thing to be granted, and in every Obligation an Obliger, Obligee, and thing to which the Obliger is bound, and so of Feoffments and other deeds.

C. 12. 73.
P. ow. 555.
Perk.
Sect. 1.
19. Ser.
G ant. in-
fra.
Numb. 4.
Feoff-
ments in fra
Numb. 1. 1.

3. In respect
of the reading
of it.

The third thing required in every well made deed is, That if the party that is to seale it be a blind or or an illiterate man, and desire to heare it read, that it be so, for if such a man be to seale a deed, and he desire to heare it, or to heare the Contents of it Read or declared to him first, and it be not done, and he afterwards seale and deliver it, this is no good deed. So if upon or without any such request made by him that is to seale and deliver it, the party himself to whom it is made, or a stranger shall read the deed, or declare the contents thereof falsly and otherwise then in truth it is; the deed will be voyd at least for so much as is so misread or misdeclared. But if the party himself that is to seale and deliver it before the sealing and delivery thereof cause another that is a stranger covinously to read it, or declare the contents thereof falsly to him, and otherwise then it is, of purpose to make the deed voyd; this will not hurt the deed: So if the party that is to seale the deed can read himself and doth not, or being an illetrate or a blind man doth not require to hear the deed read, or the contents thereof declared, in these cases albeit the deed be contrary to his mind, yet it is good and unavoydable.

Co. 2. 9. 3.
11. 27.
14 H. 8. 26

4. In respect
of the sealing
of it.

The fourth thing required in every well made deed is, that it be sealed. But this sealing of deeds in times past was not used, for the Saxons used only to subscribe their names and to adde the signe of the Crosse and to set down a great number of Witnesses. And afterwards the Normans brought in with them the sealing of deeds but by degrees, for first the Kings and a few of the Nobility used it, and to seale with their Seales of Arms; afterwards all the Nobility used it, and then the Gentlemen; and about the time of E. 3. all men began to use sealing of deeds, which hath been continued ever since, so that now it is of necessity, in so much that if a deed be never so well written before and delivered afterwards, yet if it be

Termes of
the Law.
Fair. Col.
super. Lit.
215.
Co. 2. 4. 5.
Perk.
Sect. 129.

not

Perk. Sect.
130. 131.
134.

not sealed between the writing and delivery, it is not a good deed.

But if a stranger seale it by the allowance or Commandement precedent, or agreement subsequent of him that is to seal it before the delivery of it, it is as well as if the party to the deed did seal it himself. And therefore if another man seale a deed of mine, and I take it up after it is sealed and deliver it as my deed; this is said to be a good agreement to, and allowance of the sealing, and so a good deed. And if the party seal the deed with any Seal besides his own, or with a stick or any such like thing which doth make a print, it is good. And although it be a Corporation that doth make the deed, yet they may seal with any other seal besides their common Seal and the deed never the worse. And if there be 20. to seale one deed, and they seal all upon one peece of wax and with one Seal, yet if they make distinct and severall prints; this is a very sufficient sealing and the deed is good enough.

Perk. Sect.
130. 131
132.

Perk. Sect.
134.

Co. 2. 4. 5.
Perk. Sect.
137. 9 H.
6. 327

The fifth thing required in every well made deed is, That there be a delivery of it. And for this it must be known, that delivery is either actually, i. by saying something and doing nothing, or else Verball. i. by saying something and doing nothing, or it may be by both: And either of these may make a good delivery and a perfect deed. But by one or both of these it must be made, for otherwise albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or hap to get it into his hands, yet will it do him no good nor him that made it any hurt untill it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for *omnis ratihabitio mandato equiparatur*. And when it is delivered by another that hath a good authority and doth pursue it, it is as good a deed as if it were delivered by the party himself. but if he doe not pursue his authority then it is otherwise. And therefore if a deed or the contents thereof be read or declared to a man that is to seal him; and he (being illiterate) doth deliver him to a stranger, and bid him Examine him, and if it be so as it was read to him, then to deliver him as his deed, otherwise to redeliver him to him again that made it, in this case if the deed be in truth, otherwise then it was read; and yet notwithstanding he to whom it was delivered doth deliver him to him, to whom it is made, this delivery shall not availe, neither is the deed by this delivery become a good deed.

5. In respect of the delivery of it. And what shall be said a good delivery, or nor.

6. In respect of the person that doth make it.

Perk. Sect.
137. 9 H.
6. 370. Co.
1. 18. 3.
35 47. E.
3. 3.

Dyer 167.
Perk. Sect.
137 8 H.
20. Co. luper Lit
35. 3. 20.
5. 47. 10
M. 6. 25.
13. 4. 8.

And so also a deed may be delivered to the party himself to whom it is made or to any other by sufficient authority from him: or it may be delivered to any stranger for and in the behalf, to the use of him to whom it is made without authority. But if it be delivered

2. In respect of him to whom it is made.

ed

3 In respect
of the time.
4 In respect
of the manner
and order of
delivery.

red to a stranger without any such declaration, intention or intimation, unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery. And yet if an Obligation be made to the use of a third person expressed by the deed, and the obligor deliver it to him to whose use it is made; this is said to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be sealed it is nothing worth. And where it is delivered before the date, yet in the pleading of it it must not be so set forth.

If I have sealed my deed, and after I deliver it to him to whom it is made, or to some other by his appointment, and say nothing this is a good delivery. So if I take the deed in my hand and use these or the like words; Here take him, or this will serve, or I deliver this as my deed, or I deliver him you; these are deliveries, So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of Seisin of the Land; this is a good delivery. So if the deed be sealed and lying in a window, or on a Table, and I use these or the like words; There he is, take it as my deed; this is a good delivery and doth perfect the deed, for as a deed may be delivered by words without deeds, so may it also be delivered by deeds without words. But if a man seale and acknowledge before a Major or other Officer appointed for that purpose a writing provided for a Statute or a recognisance, this acknowledgment before such an Officer shall not amount to a delivery of the deed so as to make it a good Obligation, if it happen not to be a good statute or Recognisance.

As an Escrow
Quid.

The delivery of a deed as an escrow is said to be where one doth make and seale a deed and deliver it unto a stranger untill certain conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed. And so a man may deliver a deed, and such a delivery is good, But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it and not to the party himself to whom it is made. The words therefore that are used in the delivery must be after this manner. I deliver this to you as an escrow to deliver to the party as my deed upon condition that he do deliver you 20 l. for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus. I deliver this as an Escrow to you to keep untill such a day, &c. upon condition that if before this day he to whom the Escrow is made shall pay to me 10 l. or give to me a horse, or infeoffe me of the Manor of Dale, (or perform any other condition) that then you shall deliver this Escrow to him as my need. For if when I shall deliver the deed to the stranger, I shal use these

Dyer 192.

Co. 2. 4.
Plow. 491

Co. 9. 137.
Dyer 192.
567. Co.
Super Lit.
36. 49. 35.
Aff. pl. 6.

Adjudged
Trin. 37.
El. B. R.

19 H. 8.
K. clu. 88.
14 H. 8.
22. 14 H.
6. 42. Perk
Sect. 140.
141. 142.
138. 143.
144. Fitz
Feoffments
& Feit. 4.
13. 45. Co.
9. 137.
super Lit.
48. 36.

or the like words. I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions: Or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London, in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions. So it must be delivered to a stranger, for if I seale my deed and deliver it to the party himselfe to whom it is made as an Escrow upon certain conditions &c in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for *In traditionibus Chartarum non quod dictum sed quod factum est inspicitur*. But in the first cases before where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force untill the conditions be performed, then if I had made it and laid it by me and not delivered it at all, and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good.

Fitz. Fails
& Feoffe-
ments 13.

Idem.

Co. 3. 35.

But when the conditions are performed and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He therefore that is trusted with the keeping and delivery of such a writing ought not to deliver it before the conditions be performed, and when the conditions be performed he ought not to keep it but to deliver it to the party. For it may be made a question whether the deed be perfect before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case that if either of the parties to the deed dye before the conditions be performed, and the conditions be after performed, that the deed is good, for there was *traditio inchoata* in the life time of the parties, & *postea consummata existens* by the performance of the conditions it taketh his effect by the first delivery without any new or second delivery, and the second delivery is but the execution and consummation of the first delivery. And therefore if an Infant, or woman c. vet deliver a deed as an Escrow to a stranger, and before the conditions are performed the Infant is become of full age, or the woman is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an Escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not.

Co. 5. 24.
3. 26.

Co. 3. 35.
36.

See infra
at Num. b.
8.

Relation

In

Double Delivery.

In case where a deed is meerly void and doth take no effect by his first delivery, as where a woman covert doth seale and deliver a deed, or the like, and she after being sole after her husbands death doth deliver the deed again, in this case the deed is become good. So where a deed originally good doth become void by matter *ex post facto*, as by breaking the Seal or the like, if the party to the deed seal and deliver it again, by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the first delivery doth take any effect at all, the second delivery is void.

Perk. Secd.
154. 11 H.
6. 37.

And therefore it is held that if an infant or a man by duress of imprisonment do make seal and deliver a deed &c. (in which cases the deed is not void but voidable) and after the Infant being of full age, or the man imprisoned being at large, doth deliver this deed again the second time, this second delivery is void: *Debile fundamentum fallit opus*. So if a man be disseised and make a lease for years in writing and deliver the deed, and after deliver it upon the ground, this second delivery is void, for the first delivery made it his deed; but if he had delivered it as an Escrow to be delivered as his deed upon the ground, this had been a good second delivery. And by all this that hath been said it appeareth, that the putting to or subscribing of the parties name or mark to the deed he is o seal is not essential, for a deed may be good albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered. But it is the best and surest way notwithstanding to have the name or mark of the party subscribed, for by this means the deed may be the better proved when the witnesses are dead.

Perk. Secd.
154.
Co. 5. 119.

Co. super
Lit. 48.

Subscribing
of the parties
name or mark
not necessary.

New
Terms of
the Law
rit. Fall. 9.
Jac. Secd. 3
case.

Note.

Note here that albeit a writing or Escrow that is not sealed and delivered in manner as afore said may not be used nor pleaded as a deed, yet it may serve and be used as an evidence and proove of the agreement contained therein. And whatsoever may be done by word without any writing, may much more and better be done by writing unsealed or sealed, though it be not delivered as afore said.

6. In respect
of the ground
and end of it.

And the last thing required in every well made deed is, that it have a good foundation, and be to a good end, for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, sealed, and delivered, yet it may be void or at least voidable for other causes, as when it is either unjustly gotten and obtained, or corruptly, in pursuit and execution of some dishonest agreement, or to a dishonest end or purpose made. A deed therefore whether it be a feoffment, gift, grant, lease, release, confirmation, or obligation that is made or obtained by *manasse* or *duresse*, *i.* when one doth threaten another to kill or maim him, if he will

Co. 2. 9.
Perk. Secd.
16. Dyer
143. 45 E.
3. 6.

not

Manasse or
Duresse. Quid.

Bro, Du-
resse in to-
to, 9. H. 7.
25. 21 E. 4.
13.

not make him such a Deed, or doth imprison another untill he make him such a deed, and thereupon he make the deed, a deed thus obtained by force and through fear to avoid danger is void and will not bind him that made it nor availe him to whom it is made. In which matter these things must be obser. ed. 1. That there must be some threatning of life or member, or imprisonment, or some imprisonment or beating it self, for if it be onely a threatning to take away goods, or to burn a house, or the taking and keeping of a mans goods, or the like, this will not make the deed made upon that occasion to be *per duress*. 2. It must be a threatning, beating or imprisonment of the party himself that doth make the deed, or of his wife, for if it be a threatning, beating or imprisonment of any other besides the party himself that doth make the deed or his wife, this will not make the deed to be by *duress*. 3. The threatning, beating or imprisonment must be to this end, and hereupon the deed must be made, for otherwise the deed shall not be said to be by *duress*. As for examples. If four do threaten one to imprison him if he will not seale a deed to one of them 4. and he so doe, this deed shall be said to be gotten by *duress*. and therefore void. And if one threaten a man to kill him unless he will seale a deed to him and three others, and he do so; this is void as to all the foure. For if one threaten another to kill or maim him if he will not seale a deed to a stranger, and thereupon he do so; this is void as if it were to the party himself. If one threaten to kill, wound, or imprison me to make me sweare or promise to seale him such a deed, or imprison me until I do so, and afterwards at another time and in another place, when I am at liberty I do it accordingly: this shall be said to be made by *duress* and void. If I be in prison at one mans suit, and then another man doth cause me to be used more severely in prison to compel me to make him some deed, which I doe thereupon make to him; this deed shall be said to be gotten by *duress* and therefore void.

But if I be imprisoned at one mans suit (be the cause just or not) and being in prison I make an Obligation, or any other deed to a third man: this shall not be said to be by *duress* but is a good deed. So if one threaten me to take away my goods, burn or break my house, enter upon my land, kill or wound my father, or mother, brother, or sister, or friend, or do imprison any of them, and thereupon I seale a deed; this is good and shall bind me. So if one distrain my beasts to compell me to seale a deed and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seale the deed he will kill me, and thereupon I seale the deed: this is a good deed and shall bind me. If I be arrested upon good cause and being in prison or under arrest I make an Obligation, feoffment or any other deed to him at whose suit I

am arrested for my enlargement and to make him satisfaction, this shall not be said to be by duress, but is good and shall bind me. And therefore if Auditors in an account do commit an accomptant to prison, and then he make an obligation to his master for the Arrearages, this is good. And if one in prison for felony grant a reversion of land to another to help him out of his trouble, this is a good grant. If *A* and *B* enter into an obligation upon the threatening of *B* onely, this is a good obligation by *A* that was not threatened.

Estoppel.

And if one make an Obligation by duress, and after being at large take a defence upon it, this makes the Obligation good again, and the obligee is concluded to say it was by duress. A Deed also made upon or in pursuit and execution of an usurious contract,

Usury. Quid.

such a contract as whereupon the lender is sure to have in money or monies worth for the loan of the thing above the Principall more then after the rate of 6l. for the 100l. by the year also is void; In which matter these cases are to be observed. If one 6. Decembris borrow 30l. untill the second day of June next following to be paid then for it 33l. for the principall loan, if the sonne of the Obligee be then alive, and if he die before that time, that then he shall pay but 27l. which is lesse then the principall; in this case this contract is usurious and corrupt, and therefore the Deed that doth contain it is void.

If one borrow 100l. and for this mortgage land above the value of 6l. by the year, on condition that if the Mortgagor pay the money at the years end, that the estate shall cease, this is an usurious contract, therefore the deed whether it be a deed of feoffment, grant, or lease containing it is void. So if I lend another man 10l. for a yeare and take security by Statute or Obligation that the borrower pay mee the lender 20l. for it, this contract is usurious, and therefore the Statute and Obligation void. But if the agreement and Statute or Obligation be, that if the borrower pay not the 10l. within the year that then he shall pay 20l. for it, this is no usury, and therefore in this case the deed is good. If one come to me to borrow 500l. of me and tell me he is unable to pay it together, and therefore he desires he may pay it in twelve or thirteen years, and doth offer therefore to give me for my kindness 200l. over and above besides the use to let him have it so, and then the 500l. the interest, and the 200l. is cast together, and so we agree upon an Annuity of 80l. per annum for fourteen years, which is assured by Conveyances unto me; in this case the contract is usurious, and all the assurances made to perfect it are void. And yet regularly where the Principall money is lost the contract is not usurious. If a man desire to borrow of me 100l. for a yeare, and I am content to let him have it for the use of 6l. but

Bro. Deff.
fance 17.

Terms of
the Law.
Co. 5. 70.
37 H. 8.
chap. 9.
39. El. c.
18. 11. Jac.
ch. 17. 13
El. ch. 8.

Considers.
case.
Paich 7.
Jac. B. R.

h

2. Co. 152

Curia Hil.
44 Ja. B.
R. Sanders
case.

Co. 5. 69.

but withall I compell him to take a lease of me of a house at 60 l. rent, which in truth is worth but 30 l. this contract is usurious, and therefore the assurances thereupon made void. *Et sic de similibus*. But if a man the 17th of July 1579. grants me a rent of 20 l. per annum for the lease of 100 l. to be paid every half year, and the first payment at Christmasse 1580. and it is agreed between us that if he pay the 100 l. the 17th of July 1580 that then the rent shall cease; this contract is not usurious, and therefore the assurances thereupon made are not void but good. But if in this case there be a private or collateral agreement between us that he shall not pay the 100 l. and redeem the rent, and that clause be put in only to evade the Statute: then is the contract usurious notwithstanding, and the deeds and assurances thereof void. *Et sic de similibus*.

Hil. 7. Jac.
B. R.
Curia.

Bro. Obligation 79.

If one borrow 100 l. after the rate of 6 l. per centum, and the borrower do afterwards pay part of the principal and all the use within the year; and the lender doth receive it, or the lender doth sue for his money within the year; these subsequent acts do not make the contract or deeds or assurances thereof void, for it is a rule, that if the original contract be not usurious no matter *ex post facto* can make it so. If one borrow of me 10 l. and bind himself to pay me by a day, and moreover bind himself that if he pay it not by the day, that he shall pay me 20 l. for it, this contract and the deed for perfection of it are good. for this is not usurious, for all Obligations with conditions for payment of money lent are of this nature. And yet if one borrow 100 l. of me and for this mortgage land to me of a greater value then 6 l. per annum on condition that if he pay the money at any time before the years end then the assurance to be void; this should seem to be an usurious contract, for in this case I am sure to have by the agreement more then after the rate of 6 l. per centum, and so it is not in the last case before. If one borrow 100 l. for a year and give the Broker 20 l. to procure it; this will not make the contract usurious nor the assurances void; but for this the Broker may be punished.

Per. Just.
Frideman
Hil. 7. Car.

Also all Obligations made to a Sheriffe contrary to the Statute of 23 H. 6. ch. 10. are void or at least voidable by pleading. But of this see in Obligations *infra*. A deed also made containing the grant of any thing with intent and of purpose to deceive and defraud one that shall afterwards buy the same thing is void. For it is to this purpose provided by a Statute Law, That all fraudulent conveyances of land, or any rent or profit out of land made by whomsoever, with intent to deceive or defraud any that shall purchase the land, or any rent or profit out of it for money or other good consideration of the fruit and effect of their purchase, shall be void against such purchasers for so much as they buy, & against all others that come in by or under them, But all such conveyances as are made

Obligations made to a Sheriffe contrary to the statute.
Collusion in fraudulent conveyances.
1. To deceive purchasers.

Stat. 17
El. ch. 4
Co. luper
4 r. 3. stat.
30 El. ch.
18.

made *bonâ fide* and upon good consideration are not to be accounted fraudulent. For the better understanding of which Statute and the Law in these cases observe, That conveyances *bonâ fide* are opposed to such as are upon and with any trust express or implied: And good considerations are set down in the Statute to distinguish from such as are not valuable, as nature, blood, and the like. If one convey land with a present or future power of revocation or alteration at his will that doth convey it, this shall be said a fraudulent conveyance as against him that shall afterwards purchase this land: So that if one convey his land to the use of himself for life, and after to the use of divers of his blood with a future power, as after the death of *H*, or after such a day to revoke it, and before the day he sell this land to a stranger for a valuable consideration; in this case the first deed shall be said to be fraudulent and void as to him that shall purchase the land to do him any hurt. And if one convey land with such a power of revocation, and after with an intent to defraud a purchaser make a feoffment to a stranger to extinct the power, and after sell the land for valuable considerations to a stranger; in this case both the first and the second deed as to the purchaser shall be said to be fraudulent, and therefore void. And if there be grandfather, father and son, and the grandfather makes a lease for 100 years to the father, and the father to prevent the drowning of the lease by the descent of the reversion to him, doth assigne over the lease to certain friends of his to the use of his son an infant under pretence to pay debts, the grandfather dieth, the father doth continue the occupation of the land and maketh estates and doth all acts as owner of the land, the sonne payeth no debts and the assignement (albeit divers persons of quality were named, assignes) was delivered to one of the assignes of meane estate in private, and after the father doth sell the land for valuable consideration, in this case this assignment shall be taken to be fraudulent and void as to the purchaser. And if the father make a fraudulent conveyance and after continue the occupation of the land and it descend to the son after the fathers death, and he sell it for valuable consideration; in this case the purchaser may avoid the conveyance made by his father as well as if it had been made by the sonne himself, and that whether the son be privie to the conveyance made by the father or not. And if the fraudulent conveyance be made to the King, yet it is void as to a purchaser as if it were made to a common person. And therefore if there be tenant in taile the remainder in taile or in fee, and he in the remainder perceiving the tenant in taile doth intend to sell the land and bar him by a common recovery, doth sell his remainder by deed inrolled to the King, and after the tenant in taile doth sell the land by common recovery for good consideration, in this case the purchaser

Co. 3. 31.

Co. 3. 31.
89.

Co. 6. 72.

chafor fhall avoid this deed to the King, whereby alfo appeareth that a fraudulent conveyance within this ftatute may be by way of bargain and fale. And fo was it ruled by the Lord Chiefe Juftice *Hide* in evidence to a Jury at Guildhall 3. *Car.* And if there be a leafe for years, and the leffor make a fraudulent conveyance in fee, and then for good confideration maketh another leafe to begin at the end of the former leafe; this conveyance fhall be void as to the fecond leffee. And if *A* make a leafe to *B* for years upon good confiderations, and after he makes another leafe to *C* of the fame thing for the fame term to begin at the fame time upon good and valuable confideration, and *B* doth not difcover this but drives this bargain with *C*, and is witnefs to this fecond leafe, and the firft leafe is not excepted in the fecond leafe; it feems in this cafe the firft leafe fhall be void as to *C*. And in all thefe and fuch like cafes, albeit the purchafor before he make his bargain have notice of the fraudulent conveyance, yet fhall he avoid it as if he were ignorant of it. But fuch conveyances and deeds made as before fhall never be faid to be fraudulent and void as againft him that fhall have the thing afterwards if he do not give a valuable confideration for it. And therefore if one make a leafe that would be fraudulent and void as to fuch a purchafor to *A*, and after make another leafe *bona fide* to *B*, but without any rent or fine given for it, in this cafe the firft leafe fhall not be faid to be fraudulent as againft the fecond leffee, and therefore not void. So if one covenant for the advancement of his heirs males &c. to levy a fine of land by a day, to the ufe of himfelf for life, and after of his ifTue male; and before the day he make a leafe that is fraudulent for many years of purpofe, and after he doth levy a fine accordingly; in this cafe this leafe is good and fhall not be faid to be fraudulent and void by this Statute as againft the ifTue in taile. So if a man that is fomewhat foolifh and given to wafte be perfwaded to fettle h's lands upon fome of his friends, of purpofe to maintaine himfelf with it; and after fome of his lewd companions inveigle him and get him for a fmall fum of mony to convey it to them; in this cafe the conveyance firft made fhall not be faid to be fraudulent as againft thefe purchafors; and therefore it is good againft them. And if one that hath a term for 60. years if he live fo long make it away, and then he doth forge a leafe for 90. years abfolutely; and after by indenture reciting this forged leafe for valuable and good confideration doth bargain and fell this forged leafe and all his intereft in the land to *J. S.* in this cafe it feems that the firft leafe is not void, and that the purchafor fhall have nothing but the forged leafe.

A deed alfo made of any thing with intent and purpofe to deceive and defear Creditors of their juft debts and duties is void alfo as againft fuch perfons. For it is provided to this purpofe

2. To deceive creditors and others of debts and fuch like duties.

F

by

Ms. 4 Jac.
Cowell &
Bart. cafe.

Per 2 Juft.
Hil. 16, Jac.
B. R.

Co. 5. 60.
Co. 3. 83.

Co. Super
Lit. 3.

Stat. 3. H.
7. 4. 2 R.
2. ch. 3.
13 El. ch.
5. Co. 3. 82

by other Statutes. That all feoffments, gifts, grants, alienations, bargains and conveyances of lands, tenements, hereditaments, goods and chattels, or any rent, profit, or commodity out of land made by fraud or collusion of trust to him that made the same, or otherwise with intent to hinder and delay, or put off, or put by Creditors, or others of their just and lawfull actions, suits, debts, accompts, damages, penalties, forfeitures, harrisors, mortuaries, or relieves shall be void as against them to whom such thing shall belong, and he may recover the thing notwithstanding, but all such as are made *bona fide*, and upon good consideration are not to be accounted fraudulent by the Statute. For the better understanding whereof these cases following are to be heeded. If a man a litle before his death make a conveyance of his land to his children or friends of his blood with a proviso to make it void at his pleasure, and he take the profits of it as his own, or make a conveyance of it to friends to the intent they shall not be subject to the payment of his debts; having bound himself and his heires by any especialty, or to the intent that a warranty and assets shall not bind his sonne for other land or the like, in this case this conveyance shall be void as to them that should have relief upon this land by descent; and especially when the conveyance is made after the suits begun; and more especially when any judgement is had upon the suits against him that doth make the deed. And so also is the law for goods. And therefore if one be indebted to *A*. 20 l. and to *B*. 40 l. and be possessed of goods to the value of 20 l. and *A* doth sue the debtor for his 20 l. and hanging this suit, the debtor secretly makes a general deed of gift of all his chattels reall and personall to *B* in satisfaction of his debt, and yet doth afterwards continue the occupation and use the goods as his own, and after *A* getteth judgement and execution; in this case the deed of gift to *B* shall be said to be fraudulent and therefore void as against *A*. So if in this case he give all his goods to *B* in satisfaction of his debt, and before any suite begun by *A*, with any expresse or implicit trust, as to the intent that *B* shall be favourable to the debtor, or that if the debtor provide the money that he shall have the goods again, or that he shall suffer the debtor to enjoy and use the goods and pay him as he can; in these and the like cases the deeds shall be said to be fraudulent and void, for howsoever it be made upon good consideration, yet it is not made *bona fide*. So if one in consideration of naturall affection, or for no consideration give all his goods to his child, or cousin *bona fide*, this shall be a void deed as to the Creditors. *Et sic de similibus*. So if one give all his goods and chattels to his executor in his life time by deed of gift, this shall be said to be fraudulent and shall be void as to Creditors. And albeit those to whom the deed of fraud is made know nothing of the fraud, yet is the

Co. 5. 60.
3. 82. Dier
295.

Co. 3. 85.
83. Bro.
Donne. 20.
Plow. 34.

Co. 3. 25.

the deed fraudulent in that case also as well as where they are privie to it. If after a Commission of Bankrupt be sued out, the debtor make a deed of gift of all his goods to one of his Creditors in satisfaction of his debt; in this case this deed shall be void as against the rest of the Creditors and as to the Commissioners. and they may order it with the rest of the estate notwithstanding. But if *A*, bona fide and for valuable consideration mortgage his land whereof he hath a term of years to *B*, upon condition that if he repay the mony to *B* a year after that he shall reenter, and *B* doth covenant with *A*, that he shall take the profits of it untill that time &c. *A* doth not pay the mony, And *B* hoping that he will pay it in time doth suffer him to continue in possession and take the profits of it two or three years after, and in the interim judgment is had against *A*, upon a bond and execution awarded: in this case execution shall not be made of this lease, for this deed of mortgage shall not be said to be fraudulent as to the Creditor, for when a conveyance is not fraudulent at the time of the making of it it shall never be said to be fraudulent for any matter *ex post facto*.

By the
two
Judges of
Assise
Aug. 5
Car. in
Com.
South.
Lady Lam-
berts case.

Mich. 19.
Jac. Co. B.
Miller &
Pots case.

If *A* be seised of the fifth part of the Manor of *B*, and *B* of the 6th part, and *M* cometh to *A* to buy his part, and after *M* saith to *A*, my Counsell tels me I cannot safely buy of you unlessse *B* joyn, and after *B* doth grant a rent charge of 15l. *per annum* out of this Manor to *C* her sonne and the heires of his body, in consideration of natural affection (and this was about 10 Jac. *C* being then but about three years old) with proviso that if *D* (whom *B* did then intend to marry) grant to the said *C* the like rent of 15l. And for the like estate out of 20l. land by the year of the land of *B*, then the said grant to be void, and after the said *A* bought the 6th part of the said manor of *B*, and *D* her husband being intermarried, and after *A*, *B*, and *D* her husband joyn in the grant to *M*, and in this case it was ruled that this grant to *C* was not fraudulent and voyd. If one doth hold his land to pay a harior at the death of every one that dyeth tenant in fee simple, and he infeoffe his sonne and heir in consideration of naturall affection and marriage to be had between the sonne and I, and the son (to prevent the Dower of his intended wife during his fathers life) makes a lease for forty years unto his father if his father live so long, and afterwards the marriage is had, the father payeth the rent, the sonne doth sue of Court for the land and after the father dieth; in this case this lease shall not be said to be fraudulent as to the Lord to deceive him of his harior because it was made to another end.

Stat. 52 F.
2. c. 9. 34
H. 8. c. 5.
Co. 6. 76.
Lit. Bro.
5. c. 59.
Flow. 49.
Co. 8. 164.
p. 129.

A deed also made to defeat the King or other Lord of his wardship shall be void; as to a third part of the thing conveyed. And therefore if any tenant that holdeth of the King or any o-

3. To deceive
Lords of their
wardships &c.
*This law is rather
away.*

ther Lord make a feoffment or other conveyance of his land to defear and defraud the King or Lord of his wardship, priuer seisin or any other benefit appointed and preserved for the Lord by the Statutes of 32 and 34 H. 8. shall be void as to a third part thereof against the King or other Lord who shall notwithstanding have their wardship and other benefits, as if none such were made. As if such a tenant by deed enfeoffe his lineall or collaterall heire, within age, or make a lease for life the remainder to his heire, or make a gift in taile, the remainder in fee to his heire, or make a feoffment on condition that he shall reinfeoffe his heire at his full age, or make a feoffment for the payment of his debts, preferment of his wife and children, or infeoffe another, to the intent that he shall take the profits till he have an heire male and then to reinfeoffe him; all these are fraudulent, and void as to a third part of the land, and as against the King or other Lord in respect of the benefit they are to have of and by the land. But no conveyance in these cases shall be said to be fraudulent and so void for two parts of the land. And if one make a feoffment of land to two (whereof his heir is one) and their heires for money or other valuable consideration; this shall not be said to be a fraudulent conveyance of any part. So if such a joyntenant make a feoffment of his moiety to a stranger. * And in cases where the feoffment is fraudulent for a third part as before, if the feoffee dye or make a feoffment over *bona fide* before the death of the Ancestor; in these cases the deed is become good again; and the conclusion gone. If a man for fear of debts convey his lands to friends with condition that upon payment of 10l. they shall convey it to those whom he shall appoint, in this case the conveyance shall not be said to be fraudulent as to the King or other Lord, for it was done to another end, and therefore it is a good conveyance against all men but the Creditors, where deeds shall be void in part or in all, for want of inrollment, attornment, livery of seisin or the like, see afterwards.

* Dyer 9.
Co. 2. 94.

D. 68.
Co. 10. 57.

6 Where a deed good in its occasion may become void by matter *ex post facto*. And what will make such a deed void or not.
By Rasure.

If a deed that is well and sufficiently made in this Creation shall be afterwards altered by rasure, interlining, addition, drawing a line through the words (though they be still legible) or by writing new letters upon the old in any material place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted, or in the limitation of the estate, or if it be in an Obligation; when the word [Heires] shall be inserted, or the summe increased, or in the date of either, or the like; be the same either by the party himself that hath the property of the deed or any other whomsoever except it be by him that is bound by the deed, and the same with or without the consent of him to whom it is made or doth belong; in this case and by either of these means the deed hath lost his force and is become void.

Co. 11. 27.
5. 19. Dyer
59. 261.
Perk. Sed.
123. 135.
K. 4w. 162.
Fitz. Re-
lease 27.
14 H. 8. 25.
Bro. fair 9.

And

And if the alteration be made by the party himself that oweth the deed, albeit it be in a place not imaterial, and that it tend to the advantage of the other party and his own disadvantage, yet the deed is hereby become void. But if the alteration be made by the party himself that is bound by the deed in any materiall or immateriall part thereof, or a stranger without the privy or consent of the owner of the deed shall make any such alteration in any part of a deed not materiall, as if it be a deed of a grant containing a lease for years, and there be inserted between [To have and to hold] and [for 30 years] these words [from henceforth:] Or if it be an obligation and there be inserted between [*Obligo me*] and [*per presentes*] these words [*Executores meo*]; in both which cases those words are needless and without any fruit at all; hereby the deed is not hurt, but it remaineth good notwithstanding. But if the alteration be before the delivery of the deed, be it whatsoever or by whomsoever, it will not hurt the deed. And herein it must be observed that then a rasure &c. is most dangerous, and the deed thereby most suspicious when it is in a deed Poll, and there is but one part of the deed; and when the rasure or other alteration is in any materiall part of the deed; and when the alteration makes to the advantage of him that doth owe the deed and to the disadvantage of the other that made it; and when there doth appeare some other thing to be written before; and when there is no other part of the deed, recitall, defeasance, or other matter to which this may be compared, and that may make it appear to be before the delivery; and when there be other parts of the deed or other matters whereunto this being compared doth not agree in that part wherein the alteration is; and when the deed hath been in the smoke, or any such like means hath been used to cover the alteration. And in these cases the matter was ancientsly used to be tried by the Judges upon the view of the deed; but it is now used to be tried by Jurors, whether the rasure, or other alteration were before the delivery of the deed or not.

And if after the sealing delivery and perfection of a deed, the seale thereof happen to be broken off, or to be utterly defaced, so that no sign or print thereof can be seen, or it appeareth to have been broken off and it is glued, or the wax new heat and set on again; or the labell of the deed hath been broken off from the deed and is sewed on again; or the deed is new sealed with other wax, be the same by whatsoever means, or whomsoever unless it be by him and his means that is bound by the deed; in these cases and by either of these means the deed is become void. But if any peece of the seal remain fixed to the deed, and there be any print left upon that peece, the deed doth continue good. And if after the seale of a deed be broken off the party that sealed it, doe seale and deli-

2. By breaking
inglor defacing
of the Seal

Perk. Sect.
123, 124.
Bro. Fait.
6, Perk.
129, 127.
128.

Co. Super
Lit. 255.

Dier 59.
Co. 11. 28.
5. 23.
Dier 112.
Perk. Sect.
135, 136.
Bro. Ob.
lig. 83.

ver it *de novo*, by this means it seems the deed is become good again.

By redell-
ary or can-
celling of it.

And if a deed be delivered up to the party that is bound by it to be cancelled, and it be so; or if he that hath the deed doth by agreement between him and the other cancell the deed; by either of these means the deed is become void. But if an Obligee deliver up an Obligation to be cancelled, and the obligor doe not afterwards cancell him, but the obligee happen to get him again into his hands and sue the obligor upon him, the obligor hath not any plea to avoid him, for the deed remains still in force.

Trin. 38.
Rl. Co. B.
Dier 112.

4. By disagrec-
ment.

And if an Obligation be delivered as an Escrow to a stranger to be delivered to the obligee on certain conditions, or to a stranger to the use of the obligee, and when this is after rendred to the obligee he doth refuse it and disagree to it; or if an Obligation be made to a feme covert, and her husband disagree to it, in all these cases the deed is become void. And like law is of other deeds in divers such like cases. But the party bound by the deed may not in these cases plead *non est factum* to the deed. And in these cases when the party hath once by his disagreement made the deed good, he cannot afterwards by his disagreement make it void: and when once, by refusal and disagreement he hath made the deed void, he cannot by agreement or acceptance afterwards make it good.

Go. 3 26.
5. 119.
Dier 167.

Agreement.

A deed also good in his original creation may be afterwards damned or avoided by sentence and order of a Court, and this is usually done in the Starre-Chamber and in the Chancery, and it is when it appeareth that the deed was obtained by some fraud, force, circumvention or such like practise, or when it doth appear to be forged, or the like.

Crom. Jur.
29. 40.
Bro. Faits
38.

5. By Judge-
ment of a
Court.
Vacat of a
deed.

7. When and
where a deed
may be good
in part and
void in part.
Or good a-
gainst one
person and
void against
another. Or
not.

For the answer of this question these differences must be observed. 1. When a deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the deed which is void in part from the beginning is entire, and when it doth consist of several clauses, and when it doth consist of several clauses when the severall clauses are absolute and distinct, and when they are severall and yet the one hath dependency upon the other. For if any of the Covenants of an Indenture, or the conditions of an Obligation be against Law, and the rest of the covenants or conditions be good and Lawfull; in this case those that are against Law and the deed, as to that part are void *ab initio*, and the rest of the deed as for that part are good *ab initio*. So if three distinct Obligations are written upon a peece of parchment, and the one of them only is read to the obligor, and he being an illiterate man seale and deliver the deed; in this case this is a good deed for that which was read, and void for the rest *ab initio*. But if an obligation be for 20 l. and it be read to the obligor an Obligation of 20 s. this is void for the whole *ab initio*.

Co. II. 27.
14 H. 8.
27, 28, 29.

If.

Co. 11. 27. If a deed be read as containing the grant or gift of an estate taile
Kelw. 70. and a letter of Attorney to give Livery of Seisin, and in that sense
3 E. 30. 31. the party doth seale it, and in truth it is a feoffment and convey-
ance of an estate in fee simple; in this case albeit the letter of attur-
ney were truly read, yet because it hath dependence on the estate, it
is void for all.

Co. 11. 28. If a man be indebted to me 20l. on a Contract, and 1 col. on an
Fitz secr. Obligation, and he pay me this 20l. and I am to make a Release
ments and for it, and the intendment of the Release is no more; and it is so
Faits. 57. read to me being an illiterate man, but in truth it is a general Re-
47 E. 3. 3. lease; in this case it seems it is good for so much as it is intended
and was declared, and void for the rest.

Dier 27. If the condition of an Obligation be altered by Rasure, &c, the
obligation also is hereby become void, because the condition and
obligation are one deed, but if the Rasure &c. be in the defeasance
of an obligation, this will not make the obligation void.

14 H. 8. If a deed contain divers distinct and absolute Covenants, and
25. 26. any of these Covenants be altered by addition, interlineation, ra-
Co. 11. 28. sure, or the like, by this means the whole Deed, and not that part
only, is become void.

Co. 5. 23. If there be divers grantors, obligors, &c, named in a Deed, and
11. 28. one of them only do seale the Deed, this is a good Deed as against
3 H. 7. 5. him that doth seale, and void as to all the rest that do not seale.
And if divers enter into Covenants by a deed severally, and the seal
of one of them is broken from the deed; in this case the deed is
good still as to all the rest, but void as to him. But if an obligation,
or the covenants of a deed be joynt and not several, or joynt and
several, and the seal of one of the obligors or covenanters is
broken, or the obligation or covenants be altered by rasure or the
like; hereby the whole deed is become void.

14 H. 8. If I be bound in an obligation to a Monk and I S. this deed is
29. Pe. k. void as to the Monk but good as to I S: So if a Monk and I be bound
fo. 2. to another; this is good as against me, but void as against the
Monk, and so it is in case of a Grant.

Co. 1. 173. By a power of revocation or a condition a deed may be made
Dier 127. void in part, and continue in his force for another part. And there-
fore it seems in the usual case where a deed is made upon con-
See in dition, That if such a thing be or be not done, that the deed shall
Leaks be void, or that these presents shall be void; that in these cases
Numb. 13. the whole deed and all the covenants therein contained are void:
But if the frame of the condition be, That upon such a thing to be
or not to be done, it shall be lawfull for the feoffor, lessor, &c. to
re-enter, or that the demise shall be void, without more words;
in these cases the estate only, and those covenants that are incident
thereunto, as for quiet enjoying and the like, and the deed as to
that

that part onely is void: and for other covenants that are collateral and have no dependence upon the estate that the deed doth remain in force and is good still, for a man may grant two acres upon condition to reenter into one of them. If it be intended that the whole deed shall be void, the best way is to use these words [then these presents and every thing therein contained shall be utterly void.]

§ How and to what time a deed shall have relation, and when it shall begin to take effect.

All deeds do take effect from, and therefore have relation to the time not of their date, but of their delivery: and this is alwaies presumed to be the time of their date, unless the contrary do appear. And hence it is, That if a Statute be acknowledged the 26 day of May, and the conusee make a release of all demands dated the 25 day, and deliver it the 27 day that by this release the Statute is discharged. And if the defeasance of a Statute do bear date before, and the delivery of it be after the Statute; that the conusor may shew this, and take advantage of it in avoidance of the Statute. And that if a writing be dated in the minority of an infant, and be sealed and delivered by him when he is of full age, that this is a good deed and will binde him. And that if a release be supposed to be made by a husband to barre a duty due to the wife, and it be dated during the coverture, but in truth it is sealed and delivered by the husband before the coverture; that this shall not bar the wife: the time therefore of delivery of a deed is material in all these and the like cases; and this is alwaies to be tried by a Jury. And hence it is also, That if the next presentation to a Church be granted to two several persons by several deeds of several dates and the deed that beareth the last date be first delivered; in this case he to whom this deed is made shall have the Presentation and not the other, whose deed albeit it be dated first, yet is delivered last. And hence it is also that if a lease be made for years, to begin from henceforth, or a *confessionis presentium*, or a *die confessionis*; that this lease shall be said to begin from the time of the first delivery, and not from the time of the date.

Relation.

And where deeds have a kinde of double delivery, as in case of a delivery as an Escrow, there they shall take effect from, and have relation to the time of the first delivery or not *ut res valeat* for if relation may hurt, and for some cause make void the deed (as in some cases it may) there it shall not relate. But if relation may help it, as in case where a feme sole deliver an Escrow, and before the second delivery she is married or dyeth, in this case if there were not a relation the deed would be void, and therefore in this case it shall relate. So if one disseise me of two acres of land in D; and I release to him all my right in my land in D, and deliver it to an estranger as an Escrow, &c. untill a time, and before that time he disseise me of another acre there; in this case this release shall not by relation extend to this other acre to barre me

of.

Co. 2. 45.
5 H. 7. 26.
Plow. 491.
Dier 307.
315. Fitz.
Feoffments
& Faits
87.63. 95.

Fitz. Ecoff.
& Faits
Barre 147.

Co. 5. 1.

Co. 3. 35.
36.
18 H. 6. 9.
27 H. 6. 7.
Plow. 344.

of that also. But as to collateral acts there shall be no relation at all in this case. And therefore if the obligee release before the second delivery, the release is void and will not barr the party obligee of the fruit of his obligation.

If a man that is party and privy in estate or interest, or one that doth justifie in the right of one that is such a party or privy shall plead a deed in any Court; although he claim but parcel of the original estate, yet in this case he must shew the original deed to the Court: and the reason of this is, to the end that the legal part of the deed (the tryal whereof belongeth to the Judges) may approve it self; that it may be seen whether the composition of words be sufficient in Law or not, and then that it may appear whether the estate be with Condition, Limitation, or with power of Revocation, &c. to the end that if there be any such thing in it and there be no other part of it, the other party may take advantage of it, and then that it may appear to be without rasure or interlining and the like, and also that it may appear to be well sealed and delivered (the tryal whereof doth now belong to the Country.) But strangers to estate that are neither parties nor privies shall not be compelled to shew the deed though they make use of him. And when a deed is thus shewed in Court it must remain in that Court all the Term wherein it is shewed in the custody of the *Custos breviarum*, and at the end of the Term if the deed be not denied the Law doth adjudge the possession of the deed in him to whom it doth belong. But if the deed be denied, then it is to be kept there untill it be determined. Also when a deed is shewed in Court, the adverse party may take any advantage by it that it will afford him, as if a feoffment be made by deed poll on condition and the feoffee doth break the condition, and the feoffor doth enter, and the feoffee doth sue him and makes his title by that deed, the feoffee may take advantage of the Condition.

Any man that hath occasion to use or plead a deed, may set forth the delivery thereof to be at any time after the date of the deed, and in some cases he must do so if he will have any advantage by it. As if he plead a release to an obligation, and it beareth date before the obligation; in this case he must averre that it was delivered after or it will not avail him. But a man may not in pleading set forth the delivery of a deed to be before the date of the deed. And yet if it be so that a deed be dated after the time of the delivery of it the deed is good, and therefore if he that doth use such a deed do plead and set it forth as a deed made before the time of the delivery, and the party that made it plead *Non est factum* to the deed, a Jury upon the Tryal may finde the truth of the case: but if he by his pleading set forth the deed to be delivered before the time of the date, then the Jury is concluded aswell

9. When and where a deed must be shewed in Court. And how long it shall abide there. And who may take advantage of it.

10. Where one may say his deed was delivered at another time or in another place.

Esstopel: 1.

as the party himself, for a Jury is estopped to finde any thing contrary to that which is apparently admitted in the Record. In debt brought by an Executor, the defendant pleaded the release of the Testator, which did bear date after the death of the Testator, but he did averre the delivery of it in the life time of the Testator, and the Court did not allow of this plea. 12 H. 6. 1.

Sometimes Antiquity added a place where the deeds were made, as *Datum apud B.* and this was in disadvantage of him to whom the deed was made; for if the deed be in general and without this addition, he may allege the deed to be made where he will. An obligation made beyond the Seas may be sued here in *England* in what place the obligee will, and if it bear date at *Burdeaux* in *France*, it may be alleged to be made in *quodam loco vocat. Burdeaux* in *France* in *Islington* in the County of *Middlesex*, and there it shall be tryed: for whether there be such a place in *Islington* or not, it is not traversable in that case. Co. super Lit. 6.
Co. super Lit. 261.

II. *Non est factum* Quid. And where this may be pleaded to a deed, or not.

Non est factum is an answer to a declaration whereby a man denieth that to be his deed whereupon he is impleaded.

If any deed or writing be used against a man in any Court, and it want writing, sealing, or delivery; or it be not sealed, written, and delivered as before is set forth, the party that is sued upon it or against whom it is pleaded, may plead this plea to it. So also if a deed by any alteration of Rasure, &c. become void, in this case the party may Plead this plea to avoid it. So also where a deed doth become void or lose his vertue by the not reading, or not true reading of it to an illiterate man, or by refusal or disagreement as in the cases before, the party may plead this plea to avoid it. But in all cases where the deed is voidable and so remaineth at the time of the pleading, as if an Infant, or man of full age by duress seal and deliver a deed; or if an obligation be well sealed and delivered by two, and the deed be joynt, and the obligee sue one of them; in these and such like cases the party bound by the deed may not plead *Non est factum*, for in the first and such like cases he must avoid it by special pleading, with conclusion of Judgement *si Alion &c.* and in the last he must plead in abatement of the Writ, &c. And if an obligation or any other deed be by any special Act of Parliament made void, the party that is bound by it cannot plead this plea of *Non est factum* to it, but he must avoid it by special pleading of the matter, and taking advantage of the Statute, and so with conclusion of Judgement *si Alion &c.*

And now we come to the Exposition of Deeds.

CHAP. V.

Exposition of Deeds.

IT is further to be observed that Deeds for the most part consist of these things. *viz.* the Premises, *Habendum*, *Tenendum*, *Reddendum*, or reservation, Condition, Warranty, and Covenant. And in the Premises there is sometimes a Recital, and sometimes an Exception contained: But all these are not essential parts of a deed, for a deed may be good albeit it have not all these parts or it be not so formal and orderly drawn and made.

Co. super
Lit. 6. 7.
Co. 11. 51.
2. 55.
Flow. 196.

The Premises of a deed is all the forepart of the deed before the *Habendum*. And yet this word is sometimes taken for the thing demised or granted by the deed. And the office of this part of the deed is rightly to name the grantor and grantee and to comprehend the certainty of the thing granted, either by express words, or by that which by reference may be reduced to a certainty, and the exception or thing to be excepted if there be any. And in this part of the deed is the Recital (if there be any in the deed) for the most part contained. And herein also is sometimes (though improperly) set down the estate.

1. Premises.
Quid.

Co. super
Lit. 6. 7.
10. 109.

The *Habendum* of a deed is that part of the deed which doth begin with, To have and to hold. And this doth properly succeed the Premises. And the office hereof is to set down againe the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. And herein also is sometimes though needlessly set down againe the thing granted. But the deed that doth usually consist of all these parts may be good notwithstanding some of them be omitted and it be not so formally made. For an estate may be made by a deed without any *Habendum* at all. As if one give or grant land to another and his heires, without any more words in the deed; or if one give or grant land to another, and limit no estate without any *Habendum* in the deed; and seale and deliver this deed and make Livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made. And if the name of the grantee be not contained in the Premises; yet if it be in the *Habendum*, it may be good enough. As if one give or grant land *Habendum* to B and his heires, and he is not named in the Premises, yet this is a good deed to make an estate in fee simple. And yet if the thing granted be only in the *Habendum* and not in the Premises of

2. *Habendum*.
Quid.

3. Where a deed is good notwithstanding some seeming fault in the Premises, or *Habendum*.

the

the deed, the deed will not pass it. And therefore if a man grant black acre only in the Premises of a deed *Habendum* black acre and white acre; white acre will not pass by this deed. But if the thing newly added be implied in the thing granted by the Premises of the deed, as being an incident thereunto or otherwise, or it be the same thing, and expressed in other words only, in these cases the Premises and the *Habendum* may stand together. As if one grant a manor, *Habendum* the manor with the Advowson appendant to the manor; or if one grant a Reversion of land by the name of a reversion in the premises, *Habendum* the land it self, in both these cases the deed is good and the advowson and reversion will pass. So also if livery of Seisin be made of the thing newly added, in this case perhaps it might pass by the Livery. And if the thing granted be left out in all, or in part in the *Habendum*, yet the grant is good. And thereof if one grant land to *A Habendum* to *A* his heires, &c. or if one grant white acre and black acre to *A Habendum* white acre to *A* and omit black acre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases. And if a feoffment be made to one, *Habendum* to him and his heires, without the word Assignes; this is a good feoffment and the estate thereby made is assignable: as where a lease is made to one his executors and administrators, without the word Assignes, this is a good lease and assignable. So if one grant land to *A Habendum* to him for 100 years; or *Habendum* to him and his assignes for 100 years; these are as good leases as the lease that is made by these words *Habendum* to *A* his executors, administrators and assignes for 100 years. So if a lease of land be made to *A Habendum* the land to him and his heires for 100 years. this is a good *Habendum* and the word [heirs] is void, and it shall go to his executors, &c. As also where land is granted to *A Habendum* to him and his Successors for 100 years; this is a good lease, and the word [Successors] void, for it shall go to executors &c. And if a lease be made *Habendum* for years, and say not how many years, this is a good *Habendum* and a lease for two years.

A Recitall is the setting down or report of something done before.

3. Recitall.
Quid.

4. Where it is needfull; or not.

5. Where a recitall will hurt a deed; or not.

When a man is to take any new estate from the King of a thing whereof there is any estate in being, there the former estate if it be good and of record must be rehearsed and recited in the deed, for else the second grant will not be good; but in case of a common Person there needs no such recital, neither when a man is to derive an estate out of a former, or assign over a term of years, is it needfull there should be any recitall of the former estate in being.

If one recite or rehearse an estate made for term of years, and then

Plow. 139
Dier 96.
Perk. Sect
251.

Lit. s. Co.
super Lit.
46. Co. 6.
35. New
Terms of
the Law,
tit. Assigns

Co. 1. 45.
Dier 77.

Co. 474.

then after grant over that terme to another, and mistake in the recitall; this mistake may make all void. As if a *Fieri facias* come to a Sheriff to levy a debt, and he by writing recite that the defendant hath a terme of years, and doth suppose it to begin 1. *May*, 2. *Jan.* when in truth it doth begin the 20th of *August* and then sell the same terme; in this case the sale is void. But if headde with all these words in the deed [And all the interest that the defendant had in the land] or if he make sale of it for a certain number of years only; this grant may be good notwithstanding the misrecitall.

Dier 93.
160. If one recite a former lease to be made such a day to *I S* and then make a new lease to begin after the end of the former lease, and mistake the date of the old lease; in this case the deed is good notwithstanding this mistake.

8 H. 7.
Fitz.
Grant. If one grant a reversion, and in reciting the lease in possession mistake the date of it onely and recite all the rest truly; this will not hurt the grant. No more then where a man doth recite that such land came to him by forfeiture, and then doth grant it by name; for in this case albeit it did not come to him by forfeiture but by surrender, yet this mistake will not hurt. And yet in case of the King such a misrecitall may make the grant void.

Dier 50.
27 576. If I grant to *I S* all the lands in Dale which I purchased from *I D* or which came unto me by descent from *I D*; or I give all my goods to *I S* which I have as executor to *I D*, and in truth I have no such lands or goods; but I had them by some other means or of some other; in these cases and by this mistake the deed is void. But if I grant to *I S* all my lands in Dale by name: as white Acre which I purchased of *I D*, and in truth I did purchase them of another, in this case this mistake will not hurt the deed. So if I grant 20 load of wood in Dale in the great wood which I had of the grant of my father, and in truth I had not of the grant of my father but of the grant of another, in this case the grant is good. But of this matter see more in Grant Numb 4 part 5.

Plow. 36.
195 Dier.
59. Perk.
Sect. 625.
Co. super
Lit. 47.
2 H. 6. 45. An Exception is a clause of a deed whereby the feoffor, donor, grantor, lessor, &c. doth except somewhat out of that which he had granted before by the deed. And this doth most commonly and properly succeed the setting down of the things granted, and is made by one of these words *Except*, *præter*, *Salvo*, *Si non*, or such like. And hereby the thing excepted is exempted and doth not passe by the grant. neither is it parcell of the thing granted: as if a mannor be granted excepting one acre thereof, hereby in Judgment of Law that acre is severed from the manor. But this may be in any part of the deed, and so hath it been resolved. *Hil. 17 Car.*

B.R. Fre-
gunnels
case.
Perk. Sect.
63. &c. 1

In every good Exception these things must allwaies concurre,
1. This Exception must be by apt words. 2. It must be of part

6 Exception.
Quid?

7 What shall
be said a good
exception; or
not.

of

of the thing granted and not of some other thing. 3. It must be of part of the thing onely, and not of all, the greater part or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have and doth properly belong to him. 6. It must be of a particular thing out of a generall, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It must be certainly described and set down. As for examples: If a man grant all his lands in *Essex* saving, besides, or except his lands in dale or all his lands in Dale excepting one house, or one acre in certain; or one house excepting one chamber in certain; these and such like Exceptions are good. And if one grant a manor excepting one Tenement (parcell of the manor) or excepting the Services of *IS* (who doth hold of the manor) or excepting one Close, or excepting one acre, or excepting the Advowson appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the grosse trees; these are good exceptions.

And if one grant a mesuage and houses thereunto belonging excepting the barn or excepting the Dovehouse, it seems this is a good exception, for they may passe by the grant of a mesuage &c. And if one grant land excepting the Timber trees thereupon, or excepting the trees thereupon; or if a man sell a wood excepting 20. of the best oaks, and shew which in certain; these are good exceptions. So if one have a manor wherein is a wood called the great wood, and he grant his manor excepting all the woods and underwoods that grow in the great wood and all the trees that grow elsewhere, this is a good exception. And if one grant a mesuage and all the lands and tenements thereunto belonging excepting one cottage; this is a good exception. And if one grant a reversion excepting the rent; this is a good exception of the rent and doth keep it from passing by the grant. So if a man have a rent charge out of land and he release his right in the land except the rent; So if the Lord release to his Tenant *Salvo dominio suo*, &c. these are good exceptions. And if one grant all his horses except his white horse this is a good exception of the white horse. And if a man be seised of a manor, and lease it by deed indented for life *exceptis & reservatis quod bene liceat* to the lessor *succidere, dare & vendere omnes grossas arbores in dicto manerio crescentes* &c. it seems this is a good exception of the trees. But if the exception be of another thing then the thing granted; As if one grant a manor or land excepting 12d, or excepting the Tithes, or excepting one acre of ground which is no parcell of the manor of the land before granted; or if one grant the land descended to him of the part of his father excepting the land descended to him of the part

Plow. 19.
Co. super.
Lit. 47.

Plow 195.
Perk. Sect.
641.
Dier 103;
Plow. 104;
361. 67.
Co. 8. 64.
11. 47. 5.
11. Perk.
Sect. 641.
3 H. 6. 35.

34 H. 8. 1.

Co. 8. 63.
5. 23.

In the
case of
M. ward
& Fub.
cher. Hil.
3 Car. B.
R. Co. 11.
64.

Perk. Sect.
113. 644.
Dier. 157.

Plow. 361.

3 H. 6. 45.
Perk. Sect.
643.

Perk. Sect.
639. Dier.
59.
Plow. 361.
67. 370.

of

Dier 97.
264. Co.
super Lit.
47.
Flow. 153.
103. 104.
24 H. 8. 1.
Doct. &
Stud. 98.

Dier 53.
265.

Flow. 524.
Dier 264.
Er. Grant.
60. 38 H.
6-38.

Co. super
Lit. 150.

Co. 5 12.
Hil. 9. Ja.
B. R. per.
Curiam.

This difference hath
been agreed.

Co. super
Lit. 47.
Flow. 53.

Perk. Sect.
43. 641.

Co. super
Lit. 6. &
Co. 9. 130.

of his mother; these exceptions are void. Or if the exception be such as it is repugnant to the grant and doth utterly subvert it and take away the fruit of it, as if one grant a manor or land to another excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grasse of it; or grant a manor excepting the services; these are void exceptions. So if one grant his house, chambers, cellars, and shops, excepting his shops; it is said this is no good exception. And by the like reason if one grant his meadow and pasture grounds except his meadow grounds, this exception is not good no more then if one grant two manors or two acres excepting one of them. And of this opinion was the Chief Justice in *B. R. Hil. 3 Car* in the case of *Howard and Fulcher*. And yet if a man make a lease for years of a Mill excepting the profits thereof during the life of the lessor; it is said, this hath been adjudged a good exception. But I doubt of this case, for the exceptions of the profits of a thing is the exception of the thing it self. And a man cannot grant an estate and reserve a part of the estate, as make a feoffment in fee and reserve a lease for life, or grant an Advowson and reserve the Presentation for his life. Or if the exception be of an inseparable incident and a thing that cannot be granted by it self and from another, as if a manor be granted excepting the Court Baron, or land be granted excepting the common appendant thereunto belonging; these exceptions are void. But exceptions of severable incidents are good. Or if the exception be of such a thing as the grantor cannot have nor doth belong to him by law; as if a lessee for years assign over all his terme in the land excepting the Timber trees, earth or clay; this exception is not good. But if lessee for life make a lease for years, or lessee for 21. years make a lease for 20 years; or tenant by the curtesie or in dower grant over their estate excepting the Timber trees; these are good exceptions. And if a lessee for life or years open a Cole-mine and then assign over his estate excepting the mines or the profits thereof; these are void exceptions. Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre excepting white acre, or grant 20. acres of land by particular names excepting one acre of them; these exceptions are void. Or if the exception be set down incertainly, as if one grant a house excepting one chamber; or grant a manor excepting one acre, but doth not set forth which chamber or which acre it shall be; these exceptions are void.

A *Tenendum* is a clause of the deed whereby the tenure was heretofore created. And this doth most commonly and properly succeed the *Habendum*, and was made by this word *Tenendum per servitium &c.* But since the Statute of *Quia emptores terrarum* when

In the fee simple doth pass, the tenure is alwaies of the chiefe lord, and is thus set forth, *Tenendum de capitalibus dominis &c.* And this clause at this day is for the most part omitted altogether.

9. Reservation
or *Reddendum*.
Quid.

A Reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor &c. doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly and properly succede the *Tenendum*, and is made by one or more of these words *Reddend^o*, *reservand^o*, *solvend^o*, *faciend^o*, *inveniend^o*, or such like. This doth differ from an exception which is ever of part of the thing granted and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before; so that this doth alwaies reserve that which was not before, or abridge the tenure of that which was before.

Co. 10. 109
Plow. 132
Co. Super
Lit. 47.
Perk. Sect
625.

10. What shall
be said a good
reservation.
And what not

In every good reservation these things must alwaies concur.
1. It must be by apt words. 2. It must be of some other thing

Plow. 13.
Perk. Sect.
626. Co. 8.
78.

Covenant.

3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors and not to a stranger to the deed. As for examples; If a man grant land yeelding and paying mony or some such like thing yearly, this is a good reservation. But if the grantee covenant to pay such a summe of mony, or to do such a thing yearly; this is no good reservation, but a covenant to pay a summe of mony in grosse and not as a rent. If a lease be made for years rendring a rent to the lessor or his heires, in the disjunctive; or rendring a rent to the lessor, without saying [and his heires &c.] or rendring a rent during the said term; and doth not say to whom; or rendring 10 l. to the lessor and 5 l. to his heires; all these reservations are good. But if a lease be made rendring rent to the heires of the lessor; this reservation is void because the rent is not reserved to himself first. If one grant land, yeelding for rent mony, corn, + a horse, sparrowes, a rose, or any such like thing; this is a good reservation; but if the reservation be of the grasse, or of the vesture of the land; or of a Common, or other profit to be taken out of the land; these reservations are void. If one grant a manor, mesuage, land, meadow, or pasture, or the vesture or herbage of land, meadow or pasture, rendring a rent; this is a good reservation. But if one grant Tithes, rents, commons, advowsons, offices, a coroddy, mulcture of a Mill a Faire, market, priviledge, or liberty, reserving a rent; this reservation is void. And yet such a reservation also in case of the King is good. And in case of a Subject also, if a lease be made by deed in writing of any such thing for a term of years reserving a rent; this may be good by way of contract to

Plow. 32.

Co. 5. 111.
8. 71. Super
Lit. 214.
213. 99.

Co. Super
Lit. 149.

Co. Super
Lit. 47.
Co. 3. 2. 1
Perk. Sect
626.

Prerogative.

produc

produce an action of debt, though not as a rent to be distrained for. And thus by apt words an apt rent out of Manors and such like memorable things, or divers rents may be reserved upon one grant. As if one grant the Manors of A, B, and C, rendring for A 20s. for B 10s. and for C 20s. These are good Rents and several. So if one grant the manors of A, B, and C, rendring 3 l. viz. for A 10s. for B 10s. and for C 20s. this is a good reservation, but in this case the rent is entire. Also one may reserve one rent one year and another rent another year; as 10 l. one year and 20s. another year: or one may reserve a rent to be paid every second or third year, and no rent the other years, or one may reserve one kinde of rent one year and another kinde of rent another year; and these reservations are good. And these reservations may be by fine as well as by deed, or it may be in case where the lessor hath a reversion of the land, or upon a partition to make an equality without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed. If two joynt-tenants joyn in the grant of their land by deed indented, and the rent is reserved to one of them, this is a good reservation, and shall goe to him alone. But if it be by word or by deed Poll that the lease is made the rent shall goe to them both. And if a man possessed of a Term joyn his wife with him and they both assign over this Term by Indenture, rendring a rent to them two and the survivor of them, and she doth not seal the deed, in this case the reservation as to the wife is void. And if the reservation be of the rent to a stranger that is no party to the deed and to him onely, this reservation is void. And therefore if the father and his son and heir apparent by indenture lease his land for years to begin after the fathers death rendring rent to the son, it is void.

A Condition is a clause of restraint in a deed, or a bridle annexed and joyned to an estate staying and suspending the same, and making it incertain whether it shall take effect or no.

10. Condition.
Quid.

A Warranty is a clause or covenant made in a deed by the one party unto the other, whereby the feoffor, donor or lessor doth for him and his heirs grant to warrant and secure land granted to the feoffee, donee or lessee and his heirs during the estate.

11. Warranty,
Quid.

A Covenant is a clause of agreement contained in a deed, whereby either party is bound to do, performe or give something to the other. And of all these see at large afterwards.

12. Covenant,
Quid.

In the Construction of deeds it must be considered, 1. How a deed in the gross shall be taken and enure, 2. How it shall be taken and expounded in the several parts and pieces of it. And for the first these Rules are to be known, 1. If divers joyn in a deed and some are able to make such a deed and some are not, this shall be

13. How and to what purpose a deed of grant in gross shall enure and be construed and taken.

Co. 5. 55.
Dier 108.
Co. super
Lit. 47.
ed. 1. 253.

Co. super
Lit. 225.
8 H. 7. 9.
Bro. Fine
36, Reser-
vation 4.

Co. super
Lit. 224.
243. 47.
Dier 221

Adjudge
Mich. 8.
Car. in
Blands
case. 1. 299.
for 2. 207.

Hobart
Rep. 274.
Oates &
Vix. Co. 8.

Co. super
Lit. 203.
Perk. 56.
66.

to be his deed alone that is able, as if divers joyn in the grant of thing by deed & one alone hath all the estate and the rest have nothing in the thing granted; it shall be said to be his grant alone that hath the estate. And so *converso*. If a deed be made to one that is incapable and to others that are capable, in this case it shall enure onely to him that is capable. 2. A deed that is intended and made to one purpose may enure to another, for if it will not take effect that way it is intended, it may take effect another way. And therefore a deed made and intended for a Release, may amount to a grant of a Reversion, an Attornment, or a surrender, or *converso*. And if a man have two ways to pass lands by the common law, and he intendeth to pass them one way, and they will not pass that way; in this case *ut res valet* it may pass the other way. As if a man be seised of two acres of land in fee, and letteth one of them for years, and after intending to pass them both by feoffment, maketh a Charter of feoffment, and maketh livery in the acre in possession of the name of both the acres; in this case the acre in possession onely doth pass: but if the lessee of the other acre Attorn, then the reversion of that acre will pass also. But where a man may pass lands by the Common law or by raising of a use and setting it by the Statute, there in many cases it is otherwise. As if the father make a Charter of feoffment to his son, and a Letter of Attorney to make livery, and no livery is made; in this case no use shall arise to the son. So if a man in consideration of marriage make a feoffment with a letter of Attorney to give livery, & no livery is made; in this case no use will arise. And so it was held by Ch. Justice Popham B.R. for the intention of the parties doth work much in the raising and direction of uses. And therefore it is said that when a man doth intend to pass land one way it shall never pass another way contrary to his intent, as if one covenant for good considerations to levy a fine of land to the use of *I S* and his heirs, if no fine be levied no use shall arise upon the covenant. If one by words of Bargain, sell, give and grant, make a feoffment of his house for money, and intending to pass it by way of bargain and sale and Inrolment, the deed being made, there being a Master of the Chancery in the house where of the feoffment is made, he doth acknowledge and deliver the deed before him; in this case if the deed be not inrolled the conveyance is void, and that delivery shall not amount to a livery of seisin. And yet when the intent is apparent to pass it one way or another, there it may be good either way, as where one doth make a feoffment in fee, with a letter of Attorney to make Livery, and in the same deed doth covenant in case livery of seisin be not had to perfect the deed to stand seised to the uses of the feoffment, in this case albeit no livery of seisin be made, or attornment had to perfect the feoffment or grant, yet if it be in such a case where there is a

Dier 252.
Co. 2. 35.
& super
Lit. 49.

Dier 94.

19 Eliz.
Thorold
& Gordons
case

Experientia.

con-

consideration sufficient to raise the uses by the covenant, the uses will arise by the covenant. 3. When a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he may take it that way as shall be most for his advantage. As if a deed of grant be made by the words *Don & concessi*; this in law may amount to a grant, feoffment, gift, lease, release, confirmation or surrender, and it is in the choice of the grantee to plead or use it the one way or the other. So if a lease for years be made to me of land for money by the words demise, grant, bargain and sell; I may take and use this by way of bargain and sale, or by way of demise at my pleasure. So if one have a rent out of land whereof I and my wife are jointly seised, and he doth by his deed release, give and grant this rent to me, in this case I may use this as a release to extinguish the rent, or as a grant of the rent as it may make most for my advantage. *Et sic de similibus*. But where any inconvenience may grow by such an election there the grantee shall not have an election but it shall enure as it may, as where a man may passe land by the common law or by raising of use and setting it by the Statute, there sometimes it is so. And therefore if in the same case before, a father make a Charter of feoffment to his sonne and a letter of attorney to make livery, and no livery is made; hereby no use will arise to the sonne as it will in case of a covenant. And if a lease for years be made of a Manor by the words bargain, sell, demise and grant, and this is to begin at a day to come; in this case it must passe entirely as a demise at the common law, or entirely as a bargain and sale, and the lessee hath not election to take or use it otherwise, or to use it for part one way and for part another way. 4. It shall enure as much as may be according to the apparent intent of the parties. And therefore it is that if a feoffment be made of a Manor with an advowson appendant; or a bargain and sale of land in possession and land in reversion together be made, and the feoffment is not well executed for want of livery of Seisin or Attornment, or the deed of bargain and sale is not inrolled; in these cases albeit the advowson may pass without livery or attornment and the reversion without inrolment, yet because the intent doth appear to be that all shall pass together, therefore neither the advowson nor the reversion will pass by this deed. 5. When a deed is made it shall enure as it may, and so as it may have and take the most and best effect that may be according to reason, as if tenant for life or years and he in remainder or reversion in fee joine in a feoffment by deed, this shall enure in the first case as the lease of the tenant for life and the confirmation of him in the remainder or reversion, and in the last case as the feoffment of him in the reversion &c. and the surrender of the lessee for years to the feoffee and no forfeiture of the estate in the lessee for life. But if in this

Co. super
Lit. 301.
Dier 251.

Co. 2. 36.
Dier 30.
302.

Dier 109.
309.

Co. 2. 15.
36.

Finches
law. 58.

Plow. 140.
59. Co.
super Lit.
302.

in plea and to the plea of the defendant
part way of assize and part
by way of assize and part
by way of assize and part

Forfeiture.

case the feoffment be by word, it seems it shall enure first as a surrender of the estate of the tenant for life, and then the feoffment of him in reversion *ut res valet*. And if *A* be tenant for life the remainder to *B* for life, the remainder to *D* in taile, the remainder to the right heires of *B* and *A*: and *B* joyne in a feoffment by deed, in this case this is the feoffment of *A* and confirmation of *B* but a forfeiture of both their estates whereof the tenant in taile may take present advantage. If tenant for life grant a rent charge to him in reversion in fee, and he by his deed doth grant this rent over to another and his heires; this is a good grant and confirmation also to make the rent pass to the second grantee in fee simple. So if a disseisor make a lease for life, the remainder to the disseisee and the disseisee doth grant the remainder over; this is a good grant and confirmation also. If *A* do bargain and sell his land to *B* by indenture, and before inrolment they doe both grant a rent charge to *C* by deed, and after the indenture is inrolled; in this case after the inrolment this shall be said to be the grant of *B* and the confirmation of *A*, and if the deed be not inrolled it shall be said to be the grant of *A* and confirmation of *B*. If one make a Charter of feoffment of one acre of land to *A* and his heires, and another deed of the same acre to *A* and the heires of his body, and deliver selfin according to the form and effect of both deeds; it seems this shall enure by moities, *viz.* he shall have an estate taile in the one moiety with the fee simple expectant, and a fee simple in the other moiety. If two severall tenants of severall lands joyne in a lease for years by deed indented; these be severall leases and severall confirmations from each of them from whom no interest passeth, and doth not work by way of Estoppel. If *B* tenant for life of *C* and he in remainder, or reversion in fee of the same land joyne in a lease for life or years by deed indented; this shall enure during the life of *C* as the lease of *B* and the confirmation of him in reversion or remainder, and after the death of *C* as the lease of him in reversion or remainder, and the confirmation of *B* without any Estoppel. If tenant in taile and he in reversion grant a rent charge in fee, it shall be taken the grant of the tenant in taile and the confirmation of him in reversion, but when the tenant in taile dieth without issue, it shall be taken the sole grant of him in reversion. If two Jointenants be in fee of an acre of land and they lease it to a stranger for life, and the lessee grant his estate to one of the lessors; in this case it seems it shall enure for a moiety by way of grant, and for the other moiety by way of Surrender.

Co. 3.

Co. Super
Lit. 47.Co. Super
Lit. 24.Co. Super
Lit. 45.

Estoppel.

Perk. Sect.
80.Perk. Sect.
81. Diers
140.

If there be Lord and tenant, and the Lord grant his Seigniori to his tenant and to a stranger; this shall enure for a Moiety to the tenant by way of Extinguishment,

and

Perk. Sect.
82. 83.

and for the other moiety to the stranger by way of grant. If tenant for life of the grant of a woman sole grant his estate to the husband of the wife, this shall enure for the whole by way of grant.

Co. super
Lit. 372.
Co. 7. 14. 1
147. 148.
5 E. 4. 2.

If a lease be made for life, the remainder for life to a stranger and the lessee grant his estate to his lessor, this shall enure by way of grant. If there be Lord and 2 joyn tenants in fee, and the Lord grant his Seigniorie to one of his tenants in fee; it seems this shall take effect for the whole by way of extinguishment. If there be lessee for life and the reversion descend to two coparceners, and one of them take a husband, and the lessee grant his estate to the husband and wife, this shall enure by way of grant for the whole. If the disseisee and the heir of the disseisor (being in by descent) make a feoffment by one deed and livery of seisin thereupon; this is the feoffment of the heir only and the confirmation of the disseisee. 6. If one have divers estates in land, and he make

Perk. Sect.
592.

any charge or grant upon or out of it; this shall issue out of all his estates. And if one have a possession and an ancient right, and grant a rent charge out of the land, or make a lease of the land, this shall issue out of both the estates, and it shall enure from him having several estates, as it shall enure from several persons having the same estates. *Quando duo jura concurrant in una persona*

Co. super
Lit. 302.

aquum est assistant in diversis. 7. If one that hath a rent charge out of a manor by grant reciting his grant, grant the same rent to a lessee for life of the manor out of which the rent doth issue, to have and receive to him and his heirs, and surrender to him the deed; this shall not enure to extinguish the rent but by way of grant: of which the heir of the lessee for life may take advantage if he do not by granting away the rent, purchasing the reversion of the manor, or making a feoffment of the manor, and thereby committing a forfeiture, or by some such like means prejudice himself, for by these means the rent will be extinct and determined. If a disseisor grant a rent to the disseisee, and he by his deed doth grant it over to another, or the disseisor make a lease for life or

Perk. Sect.
69.

gift in tail the remainder to the disseisee, and the disseisee doth grant over this remainder, and the tenant return; these grants of the disseisee shall be taken for a grant and a confirmation also *ut res percat.* If there be Lord and tenant of white acre and two other acres, and the Lord grant by deed to his tenant that he will not distrain his tenant in white acre for his service; this grant shall not enure to determine the Seigniorie in any part, but as a

Mich. 37
& 38 Eliz.
B. R. Curia

covenant, so that if he do distrain in white acre, the tenant may have an action of covenant. If a man have a wood of 200 acres and he grant it to another for life or years, and that he shall cut therein 4 or 5 acres every year, in this case albeit the wood be granted and the grant shall enure to pass it, yet the grantee can

cut no more but 4 or 5 acres by the year. And yet the grantor as this case is cannot himself cut any of the wood during the time, as in case where a man doth grant to another that he shall cut every year 4 or 5 acres in such a wood; for in this case the grantor may notwithstanding cut as much as he will. And here note that in all the cases before, according to the construction that the Law makes of the deed so must the party that is to use it set it forth and plead it, as when it shall enure as a lease then it must be pleaded as a lease, &c. See more in *Release. Numb. 5. Surrender Numb. 7. Confirmation Numb. 7.*

14. How a deed of grant shall be construed and taken in all the parts and branches thereof.

General Rules.

In the construction of deeds it must be observed, that there are some general Rules that are applicable to all the parts of all kinds of deeds, and some that are applicable onely to some kind of deeds and to some part of the deed onely. In the construction therefore of all parts of all kinds of deeds, these Rules are universally observed.

1. That the construction be favorable and as near to the mindes and apparent intents of the parties as possibly it may be and law will permit: for *Benigne sunt faciende interpretationes cartarum propter simplicitatem laicorum. Et verba intentioni non contra debent inferre*, as if there be Lord and tenant, and the tenant grant the tenements to one man for term of his life, the remainder to another in fee, and the Lord grant the Services to the tenant for life in fee, in this case howbeit a grant may enure by way of release, and a release to the tenant for life shall enure to him in remainder and is an extinguishment; yet because this is contrary to the intent, it shall be taken for a suspension onely of the services during the life of the tenant for life, and the services shall go afterwards to his heir. But if the intent of the parties be apparently against law, then the construction shall not apply the deed to their intent, as if one give land to another and his heirs for 20 years; in this case the executor and not the heir shall have this land after the death of him to whom it is given. So if one by deed intending to give land to another and his heirs, give the land to him To have and to hold to him, or to him and his assigns for ever, without these words [and his heirs] this is but an estate for life at the most.

2. That the construction be reasonable and according to an indifferent and equal understanding, and therefore if I grant to another Common in all my Manor, this shall be expounded to extend to comonable places onely, and not in my gardens, orchards &c. And if I grant to one Estovers out of my Manor hee may not by this cut down my fruit trees. And if one grant me (a Barrister) a fee *pro consilio*, this shall be taken for counsel in Law onely. And so in case of a Physician. And if one grant to me to dig in all his lands

Co. Super
Lit. 3. 13.
Lit. Sect.
563. Plow.
160. 154.

Doct. &
Stud. 39.
Lit. cap. 1.

Plow. 161.
168. 8. 30.
Dier 15.
Fitz Barre.
337
Bro. Don.
14. 17 E. 3.
7. 46 E. 3.
17.

lands for Tinne: I may not by this grant digge under his house. And if one grant me Common for all my beasts; this shall be taken for all my commonable beasts and not for goats and the like. And if one grant me all his trees in his manor; by this I shall not have his apple trees. And if one lease to me his house and land to the end that I may make profit thereof in the best manner: by this grant I may not prostrate the house or make wast.

3. That too much regard be not had to the native and proper definition, significations and acceptance of words and sentences to pervert the simple intentions of the parties, for a manor may pass by the name of a mesuage, or a Knights fee, if it be used so to be called: & *sic converso*, a mesuage by the name of a manor: a Remainder may be granted by the name of a Reversion, a Reversion by the name of a Remainder for the law is not nice in grants, and therefore it doth oftentimes transpose words contrary to their order to bring them to the intencion of the parties, and it is a rule of law *Mala grammatica non vitiat causam*, neither false Latine nor false English will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative when the apparent intent is contrary. And it is another rule of Law, *Falsa orthographia non vitiat Concessionem*.

4. That the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected; and that all the parts do agree together and there be no discordance therein. *Ex antecedentibus & consequentibus est optima interpretatio*, for *Turpis est pars quæ cum suo toto non convertitur*. *Maledicta expositio quæ corruptis textum*. If a man make a feoffment of all his land in D with Common in omnibus terris suis; this common shall be intended in the lands granted in D only, and not elsewhere, for it must be understood *secundum subjectam materiam*.

5. That the construction be such as the whole deed and every part of it may take effect, and as much effect as may be to that purpose for which it is made, so as when the deed cannot take effect according to the letter it be construed so as it may take some effect or other, *Verba debent intelligi cum effectu. Et benigne facienda sunt interpretationis ut res magis valeat quam pereat*. And therefore if an Annuity be granted *pro consilio impendendo*, or a feoffment made *ad erudiendum filium*, or *ad solvendum* 10s. these shall be construed conditional grants without any words of condition, for otherwise the party will be without remedy.

6. That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party, *Verba Cartarum fortius accipiuntur contra proferentem, & quilibet concessio fortissima contra donatorem interpretanda*.

Plo. 154.
170. 134.
Dier. 46.
Co. super
Lit. 223.
146. 217.
Co. 9. 48.
10. 143.

Plow. 160.
161.?

L'r. Sect.
283.
Finchesley
60.
Plow. 160.
154.

Co. super
Lit. 189.
Finch o.
the Law.
4.

Forfeiture.

reads off. And therefore if one seised of land in fee grant it to another, and say not for what time, this shall be taken an estate for life. But this is to be understood with this limitation, that no wrong be thereby done, for it is a Maxime in Law, *Quod legi constructio non facit injuriam*. And therefore if tenant for life grant the land he doth hold for life to another, and doth not say for what time; this shall be taken an estate for his own life, and not the life of the grantee, for then it would be a forfeiture. So if one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple or for life; by this grant shall pass no more but the lands he hath in fee simple. So if a man have a house wherewith there hath been Copyhold land and other land usually occupied; and he let this house and all his land thereunto belonging: in this case and by this demise the Copyhold land doth not pass: for in both these cases then there would be a forfeiture. But otherwise by these words all the land in both cases would pass.

Co. Super
Lit. 1. 2.

7. That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary, and therefore herein a Deed doth differ from a Will; for if there be two repugnant clauses in a Will the first shall be rejected and the latter received.

4 El. the
Bishop of
Ely's case.

8. That that which is generally spoken be generally understood unless it be qualified by some speciall subsequent words, as it may be; for if one be seised of a manor wherein there is a Park, and he grant the manor with the custody of the Park: by this the Park will not pass.

Go. Super
Lit. 43.

9. That if the words may have a double intendment and the one standeth with law and the other is against law, that it be taken in that sense which is agreeable to law: and therefore if tenant in taile make a lease of land to B for term of life, and do not mention for whose life it shall be; this shall be taken for the life of the lessor and not for the life of the lessee, as it shall be if such a lease be made by tenant in fee simple.

9. Ed. 4. 4

10. That things doubtfully set down be applied to him to whom they do properly belong. As if J. S. make a feoffment to one of his own name, and there is a covenant in the deed that J S shall deliver the deeds, this shall be taken of J S the feoffor and not J S the feoffee.

Co. 9. 41.
10. 143.

11. That such a construction be made of abbreviations as the deed may not lose his force, as if one grant *tot' ill' Manor de D. & C.* if it be but one manor, the words shall be taken for *totum illud Manerium*, if two manors, then it shall be taken for *tota illa maneria*. And here note that most of all these rules run through all the cases of exposition hereafter following.

Fit. Grant.
41. Plow.
217. Co.
13. 29
aff. Pl. 61.
Perk. 260.
110.

Note.

Touching

Touching things granted these rules are first to be known.

1. When any thing is granted all the means to attain it and all the fruits and effects of it are granted also, and shall pass *inclusivè* together with the thing by the grant of the thing it selfe without the words *cum pertinentiis* or any such like words. *Cuiusque aliquid conceditur conceditur etiam & id sine quo res ipsa non esset potius.* As by the grant of Consuance of pleas is granted the Ordinary proceſſe to bring causes to judgement. By the grant of a ground is granted a way to it. By the grant of Trees is granted withall power to cut them down and take them away, by the grant of Mines is granted power to digge them; and by the grant of fish in a man's pond is granted power to come upon the banks and fish for them.

2. The incident, accessory, appendant, and regardant shall in most cases passe by the grant of the principall without the words *cum pertinentiis*, but not *converso*, for the principall doth not passe by the grant of the incident, &c. *Accessorium non ducit sed sequitur suum principale.* And therefore by the grant of a reversion without naming the rent, a reversion after an estate taile, for life, or years, and the rent reserved upon the estate will passe, so as the tenant attaine to the grant: but by the grant of the rent the reversion will not passe. So by the grant of a manor, the Court Baron thereunto belonging will passe; by the grant of a house or ground, the ways thereunto belonging do passe; by the grant of errable land, the common appendant thereunto will passe; by the grant of Mills; the waters, flood gates, and the like that are of necessary use to the Mills do passe; by the grant of a house, the cſlovers appendant thereunto will passe; by the grant of a manor, the advowſons appendant and villanies regardant thereunto passe; by the grant of a faire, the Court of Pipowders will passe; by the grant of homage or rent, the fealty will passe; and by the grant of Escuage, homage and fealty will passe. But divers things that by continuall enjoyment with other things are only appendant to others, as warrens, leetes, waifes, estrayes and the like, these will not passe by the grant of those other things, and therefore if one have a Warren in his land, and grant the land, by this the warren doth not passe. And yet if in these cases he grant the land *cum pertinentiis*, or with all the profits, priviledges, &c. thereunto belonging; by this grant perhaps these things may passe. And here know that a reversion may be parcell or appendant to a thing in possession, and passe by the grant of it, but a possession cannot be parcell or appendant to a thing in reversion. And therefore if one make a lease for life of a manor excepting 20 acres of it, and after grant the reversion of the manor, by this grant the 20. acres will not passe. So if one be disseised of an acre parcell of a manor, or of common appendant to the manor, and before an entry or recontinuance of the

* The exposition of the several parts of the deeds of grant. And how the words and sentences therein shall be taken. 1. In the premises, and what doth passe by the grant of a thing.

Co. super
Lit. 152.
Lit. Secd.
572. 219.
Co. 4. 86.
87. 8 H. 7.
4. Bro.
Grant, 88.
144. 43.
Ed. 3. 32.
Co. 10. 64.
Co. super
Lit, 307.

38 H. 6. 38.
Co. 11. 47.
50. Plow.
103. Bro.
Grant, 60.
29. Co. 1.
728.

the acre or common be grant the Manor to a stranger; by this the
 were of land or common will not pass: But otherwise it is in case
 where a lease for years only is made of a parcell of a manor: And
 if a lease be made for life of 20 acres parcell of a manor, and after
 the manor it selfe is granted; by this the reversion of the 20 acres
 is granted and will pass also.

And if a man make a feoffment in fee of an acre of land parcell
 of a manor, and after repurchase it, and then grant the manor
 this acre will not passe by this grant, for it is not united by the new
 purchase. But it is otherwise of trees, for if a man make a lease
 for life of a manor or other land excepting the trees, and after
 grant the reversion of the manor or land to another; hereby the
 trees do pass. And if a man make a feoffment in fee of a manor
 excepting the trees, and after the feoffee buy the trees, in this case
 the trees are united again, so that if the feoffee sell the manor the
 trees shall pass with it. If I lease an acre of land to which an ad-
 vovson is appendant for term of life reserving the advovson,

and after do grant the reversion of that acre with the appurte-
 nances; hereby the advovson doth not pass. But if I grant the
 advovson for term of life, reserving the acre, and after grant the
 acre with the advovson *cum pertinentiis*; by this the advovson
 doth pass. If land be appendant to an office, there by grant of
 the office with the appurtenances the land will pass without livery
 of seisin: And if an office be appendant to land, there by the
 grant of the one the other will pass: 3. That which is parcell or
 of the essence of a thing albeit at the time of the grant it be actu-
 ally severed from it, doth pass by the grant of the thing it selfe.

14 H. 8.

25.

Co. 11. 50.

And therefore by the grant of a Mill, the millstone doth pass albeit
 at the time of the grant it be actually severed from the Mill. So
 by the grant of a house, the dores, windows, locks, and keyes, do
 pass as parcell of it; albeit at the time of the grant they be actual-
 ly severed from the house. 4. By the grant of the land or ground
 it self, all that is *supra*, as houses, trees, and the like is granted;

14 H. 8.

Co. super

Lit. 4.

for *Cujus est solum ejus est usque ad caelum*, also all that is *infra*, as
 Mines, earth, clay, quarres, and the like. And by the grant of a
 house, the ground whereon it doth stand doth pass. 5. When

12 H. 7. 25.

any matter of interest or profit is granted, the grant shall be taken
 largely: But when any matter of ease or pleasure only is granted
 as a walk, or the like, the grant shall be taken strictly. 6. When a
 man doth grant all his lands, or all his goods, by this grant doth
 passe not only what he is sole seised or possessed of, but also what
 he is joyntly seised or possessed of with another. And so *converso*.

Plow. 289.

19 H. 6. 4.

If two men joyn together and grant all their lands, or all their
 goods; hereby do pass not only all they have joyntly and toge-
 ther, but all those they have sole and apart. 7. Some words in

C. 7. super

Lit. 301.

Lit. Sect.

543, 544

deeds

deeds are large and have a general extent, and some have a proper and particular application: the former sort may contain the latter, as *Deeds* or *Concessions*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender: and it is in the election of the party to whom the deed is made to use it to which of these purposes he will. And hence it is that if a Lord by the words of *Deeds* & *concessions* grant to his tenant that doth hold of him his rent, or one that hath a rent charge out of land doth grant it to the tenant of the land, that in these cases the rent is extinguished albe it be by way of grant. But a release, surrender, confirmation, &c. cannot amount to a grant, &c. nor a surrender to a confirmation or a release, &c. because these be proper and a peculiar manner of Conveyances, and are destined to a special end.

Amongst words whereby things do pass some are collective, compound or general, comprehending many things, as Hereditaments, Lands, Tenements, Honors, Isles, Villages and the like, including lands of several sorts and qualities. And some words are simple or particular, as Meadow, Pasture, Wood, Moor, and the like.

The word (Hereditament) is of as large extent as any word, for whatsoever may be inherited, be it corporeal or incorporeall, real, personal, or mixt, is an hereditament. By the grant therefore of all hereditaments do pass Honors, Isles, Castles, Seigniories, Manors, Messuages, Lands, Meadows, Pastures, Woods, Moores, Marishes, Furses, Heaths, Reversions, Commons, Rents, Vicarages, Advowsons in grofs, and the like things which the grantor hath in fee simple at the time of the grant, whether he hath it by purchase or descent.

And the word (Tenement) is of large extent also, and it seems doth comprehend as much as the former. And therefore by the grant of all Tenements will pass as much as by the grant of all Hereditaments.

The word [Land] strictly doth signifie nothing but errable land, but in a larger sense it doth comprehend any ground, soil or earth whatsoever. And therefore by the grant of all Lands, doth pass errable lands, meadows, pastures, woods, moors, waters, marishes, furses, heath, and such like, and the castles, houses and buildings thereupon, but not rents, advowsons, and such like things. Also by grant of any land in possession the reversion thereof will pass. And yet by the grant of a reversion of land the land in possession will not pass.

But here it must be observed, That in cases of grants and gifts of all hereditaments, tenements or lands, consideration is had of the estate of the grantor: for if a man be seised of some lands in fee, and have other lands for life or years only, and all these are lying within one parish, and he grant all his lands, tenements or hereditaments in this parish to another in fee simple, fee tail, or for life,

The terms whereby things are granted, expounded.

Hereditament.

Tenement.

Land.

Note.

Forfeiture.

and

Co super.
Lit. 5. 6.
Co. 4. 88.

Co. super.
Lit. 6. 16.
Perk. Sect.
1. 12. 13.
11 H. 6. 32.

Bro. Grant
145. Co.
super. Lit.
6. Perk.
Sect. 114.

Co super.
Lit. 4. Co.
4. 89.
Perk. Sect.
114.

Co. 11. 47.
50. 10. 107

Edw. case.
Mich. 9.
Jac. Curia
9 H. 7. 25.
Bro.
Grant. 87.
11. H. 6. 32.

and give livery of seisin in the lands whereof he is seised in fee, in the name of all thereto; by this doth pass no more but his lands whereof he is seised in fee, for otherwise it would be a forfeiture for those lands. But if the livery of seisin be made in any part of the lands he hath for life or years, then that part wherein the livery is made will pass and no more. And if the conveyance be by bargain and sale and deed inrolled, then the lands whereof he is seised in fee simple and for life shall pass, and not the land he hath for a term of years. And yet if in this case the grant be for years, then all the lands will pass, for then there will be no forfeiture in the case, Howbeit it is said in *Bro. Done 41. pro lege*, That if a man give or grant all his lands and tenements in B, that by this, leases for years do not pass, and that these words do intend frank tenements at the least.

Forfeiture.

Honor. Hic.
Comitate
Castle.

These word, [*Honor, Isle and Comitate*] are compound words and of large extent, And therefore by the grant of the m may pass one or more seigniories, minors, and divers other lands. Also a Castle may contain one or more manors, And therefore by the grant of a Castle may pass one or more manors. And so sometimes *et converse* a Castle may pass by the grant of a manor. But by a Castle most comonly is signified no more but the house or building and the parcell of ground inclosed wherein it doth stand.

Co. super
Lit. 5.

Plow' 169.

Town or Village.

This word [*Village or Town*] is of large extent also. And by the grant of it, a manor, land, meadow and pasture, and divers such like things may pass.

Co. Tute
Lit. 5. Plo.
168.

Manor.

This word [*Manor*] is a word of large extent and may comprehend many things. And therefore by the grant of a manor without the words of *cum pertinentiis* do pass demesnes rents and services, lands, meadows, pastures, woods, commons, advousons appendant, Villains regardant, Courts Baron and Perquisites thereof that are in truth at the time of the grant parcell of the manor. But nothing that in truth is not parcell of the manor albeit it be so reputed will pass by the grant of the manor, and therefore if one have a manor, and after purchase the lawday or a warren to it, and then he grant away the manor, hereby the lawday or warren will not pass. And yet if by union time out of minde they have gotten a reputation of appendency, perhaps by the grant of the manor *cum pertinentiis* these things may pass. By the grant of a manor also divers Towns may pass. An Honor also may pass by this name, And so also may a Castle or a Hundred: And one manor also that is parcell of another manor may pass by the grant of that manor whereof it is parcell.

Co. super.
Lit. 5. 58.
Perk 168.
116. Co. 5.
11. Plow.
168. Dyer:
233. 14H
8. 1.
9. Jac B.
R. Dier.
30 BH. 7. 4
Baintons
case. M. p.

Co. super
Lit. 5. 26.
Aff. Plo. 54
2 E. 3. 36.

The word [*Knights-fee*] is a compound word also and may comprehend many things. And therefore by the grant of this may pass land, meadow and pasture as parcell of it. And sometimes

Co. super
Lit. 5. Plo.
168.

by

by this doth passe so much land as to make a Knights fee. And some say it doth contain eight hides of land And it seems also that a manor may pass by this name if it be usually called so.

Co. super
Lit. 5.
Plow. 167.

The word [Grange] is a compound word also, and by the grant of a Grange will pass a house or edifice, not only where corn is stored up like as in barns but necessary places for husbandry also, as stables for hay, and horses, and stables and sties for other cattle, and a curtilage and the Close wherein it standeth at the least. And where land, meadow and pasture, &c. belonging to such houses are called all together by the name of a Grange, there perhaps by this word the whole may pass.

Grange.

Co. super
Lit. 5.
Plow. 195.

The word [Farme or Ferme] called in Latine *firma* is also a compound word and doth comprehend many things. And therefore by the grant of a Ferme will pass a messuage and much land, meadow, pasture, wood, &c. thereunto belonging or therewith used, for this word doth properly signifie a capital or principall messuage and a great quantity of demesnes thereunto appertaining. Also by the grant of all Farmes, or all Fermes; it seems leases for years do pass.

Farme.

Co. super
Lit. 5.

This word is a collective word also, for by the grant of *unam bovaiam terre*, or of one, or of an oxange of Land may pass land, meadow and pasture, and it doth properly intend as much as an Ox can till. And *Ingum terre*, or half a Plow land is as much as two Oxen can till, and by the grant of half a plow land may pass meadow, and pasture.

Oxange of land.

Half a Plow land.

Co. super
Lit. 5.
Plow. 167.

The words [Plow land, and a Hide of Land] are *Synonyma* and are collective words also. And therefore by the grant of *Carnatam* or *Hidam terre*, or of a plow land, or of a hide of land may pass 100. acres of land, meadow and pasture, and the houses thereupon; but it doth properly intend as much land as one plow can till in a year.

A Plow land or a Hide of land.

Co. super
Lit. 5.

This word [A yard land] is also collective and doth comprehend many things, but it is not certain, for in some Countries it doth contain 20. acres; and in some Countries 24. acres, and in some Countries 30. acres, by the grant therefore of *virgatam terre*, or a yard land will pass that quantity of land, meadow and pasture that is called by this name. And so by the grant of half a yard, or a quarter of a yard land.

A yard of land.

Half a yard land.

Co. super
Lit. 6.

The word [Fold course] is also compound, for by the grant of a fold course lands and tenements may pass. *Et sic de similibus*. And finally by the grant of any such compound thing as before for the most part there doth pass thereby so much as in common reputation is accounted part of that thing and is usually called by the name.

Fld course.

Plow. 167.

8 H. 7. 1.
Be. Grant.
86.

By the grant of a Rectory or Parsonage will pass the house, the glebe, the tithes, and offerings belonging to it. And by the grant

Parsonage, Rectorie, Vi-
carage.

of

of a Vicarage will pass as much as doth belong unto it, as the Vicarage house, &c.

Messuage.
Curtilage.
House.

By the grant of a messuage, or a messuage with the appurtenances doth pass no more but the dwelling house, barn, dove-house, and buildings adjoining, orchard, garden and curtilage. i. a little garden, yard, field, or peece of void ground lying neer and belonging to the messuage, and houses adjoining to the dwelling house, and the close upon which the dwelling house is built at the most. And so much also may pass by the grant of a house. So that the quantity of an acre of ground or thereabouts in Orchard, Garden, and outlet may pass by either of these names, but more then this will not pass by the grant that is made in either of these words, albeit more have been occupied with it, and albeit more be intended to be passed by the grant. And therefore if there be a messuage or dwelling-house and divers acres of land thereunto belonging called all together by the name of Hedges, and a grant is made by these words, of all that messuage with the appurtenances commonly called by the name Hedges; by this grant nothing shall passe but the messuage, garden, and curtilage. And yet if a manor or farme be commonly called by the name of a messuage, there by the grant of a messuage the whole manor or farme may pass. And by the grant of a messuage or house and all the lands thereunto appertaining will passe all the land usually occupied therewith. Also by the name of a messuage a Chappel or a Hospitall may be granted.

Plow. 84.
15. 171.
178. 569.
Lit. Bro.
Sect. 31.
185. Co.
Super Lit.
5. Co. 10.
65. Kew.
57. 27H.
6. 2.

See before.

Lit. Bro.
Sect. 185.
160. Bro.
Leases 55.
Plow. 170.
13 Aff. Pl. 3
Co. super
Lit. 4.

Cottage.

By the grant of a Cottage doth passe a little dwelling house that hath no land belonging to it.

Errable land.
Meadow,
Pasture.

By the grant of all a mans errable land there doth passe no more but that kinde of land: and by the grant of all a mans meadow ground, or all a mans meadows doth passe no more but that kind of ground. And by the grant of all a mans pastures doth pass no more but the land or ground it self imploied to the feeding of beasts, and also such pastures and feedings as he hath in another mans soile.

Wood, Trees.

If a man have divers acres of peeces of Wood, and grant to another *omnes boscos suos*, or all his woods, or all his woods growing in such a place; by this grant doth passe all the highwood and underwood, and not only the wood growing upon the land or soile but the land or soile it self wherein it doth grow. But in this case if the grantor have in the same place divers peeces of wood, and divers closes wherein there are divers trees growing in the hedges, it seems in this case these trees in the hedges shall not pass by this grant in these words, especially if the case be so that the cutting of them will be a waste. And yet if the grantor have no peeces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this case it seems all the trees except the apple trees doe passe, but not his hedges and hedgrows. And in case

14 H. 8. 1.
Perk. Sect.
116. Co. 5.
11. Br. Do-
nce 14.

Co. 5. 11.
11. 50.

Curia Hill
16 Jac. B.
H. Pinch.
combs
case.

Dier. 374.
Co. 11.
48.

Co. super
Lit. 4. 5.

Co. super
Lit. 5.

Co. idem.

case where the trees onely do pass, as where the grant is of all a mans trees, there shall pass no more of the soil but so much as shall serve for the nutriment of the trees, and the owner of the soil shall have the grafs growing thereupon also. If a man grant to another all his saleable underwoods within his Manor which have been usually sold by the owners of the Manor with free entry, egress and regrefs for selling, making and carrying the same away at all times convenient; in this case it seems the soil doth not pass but the wood onely. And yet if those words with free entry &c. be omitted, *contra*.

If one devise, grant, and to term let a farm with all manner of timber, wood, underwood and hedgrows except the great oaks in such a close, to have and to hold the Farm for 21 years, in this case albeit there be the word Grant, and that the trees be not named again in the *Habendum*, yet the other trees do not pass by this Grant otherwise then in other leases, and if the lessee cut any timber to sell, it is waste in him.

A Toft is a place where a mesuage hath stood, and by this name in a grant such a thing will pass.

Brera is a heath or heathy ground. *Frassetum* is a wood or piece of ground that is woody. *Alnetum* is a wood of Elders, or place where Elders grow. *Salicetum* a wood of Willows, or Place where Willows grow. *Selda* a wood of Sallows; Willows or Withies, or place where such things grow. *Filicetum* is a braky ground or place where such things grow. *Fraxinetum*, a wood of Ashes, or place where Ashes grow. *Lupulicetum*, a hopyard or place where hops do grow. *Arundinetum*, a place where Reeds grow. *Roncacia* or *Runcaria*, a place full of bryars or brambles. *Juncaria* or *Joncacia* or *Iampna* (which are all one) a place where rushes do grow. *Ruscacia*, a place where kneeholm or butchers pricks or broom doth grow. *Mariscus*, a fenne or marish ground. *Mora*, a more barren and unprofitable ground then a marsh. And by grant of these and such like things or of 20 acres of such ground, these particular kinds onely or so many acres thereof do pass. *Vacaria*, is a Dairy house, *Porcaria*, a Swinesty. *Bercaria*, a Tanhouse: and by these names these things will pass. By the name of *Stragnum* or Pool, or *Gurgis* a gulf, the water, land, and fish in the water will pass.

By the grant of *Stadium*, *Ferlingus*, or *Quarentena terre* doth pass a furlong or furrow long, which anciently was the 8th part of a mile. By the name of *Selis* or *porca terre* doth pass a ridge of land which is sometimes longer and sometimes shorter. By the grant of an acre of land doth pass so much as is an acre by measure in that Countrey by the ordinary account and measure of the Countrey. By the grant of a Rood of land doth pass 10. pearches.

Toft.

Brera. *Frassetum*. *Alnetum*. *Salicetum*. *Selda*. *Filicetum*. *Fraxinetum*. *Lupulicetum*. *Arundinetum*. *Roncacia*. *Juncaria*. *Ruscacia*. *Mariscus*. *Mora*.

Vacaria. *Porcaria*. *Stagnum*. *Gurgis*.

Stadium. *Ferlingus*. *Quarentena terre*. *Selioterre*. *Acres of land*. *Rood of land*.

ches the fourth part of an acre. And by the grant of 6 foot in length and two foot in breadth, so much onely doth pass. And by these and such like names land may be granted.

Mines.

By the grant of *Mineras* or *Fodinas plumbi &c.* or Mines of Lead &c. the land it self will pass if livery of seisin be made there: of, but otherwise it seems not, and then the grantee hath by the grant a power to dig onely granted unto him.

Co. Super
Lit. 6. Co.
572.

Trench.

If one grant to me to dig a Trench in his ground from such a place to such a place to convey water by a lead pipe, or otherwise; hereby also *inclusus* is granted a liberty at any time after to dig to amend it as occasion shall be.

Park. Sec.
111.

Turfs.

If one grant to me to dig Turfs in his land or soil, and to carry them away at my will and pleasure, by this is not granted the land it self, the houses or trees thereupon or mines therein.

Co. Super
Lit. 4.

Common.

If one grant to another Common for all his beasts in his land; hereby is not granted Common for Goats, Pigs, and such like beasts and cattel that are not commonable. But if the grant be of Common for all manner of Beasts, *contra*. And if one grant to another Common without number in his land, the grantor is not hereby excluded to Common there with the grantee.

Co. Super
Lit. 4.
Park. Sec.
108. 109.

And if one grant to me Common of Pasture for 10 Kine in his Lands in Dale; by this grant I shall have Common in his commonable grounds and lands onely and not in any other lands. And if a man grant Common of Pasture to me for my beasts *ubicunque averia sua jervint*, and he occupy 100 acres of land with his beasts, and after he keep no beasts; yet by this grant I may keep my beasts in those 100 acres. But if he grant to me Common of pasture for my beasts wheresoever his cattel shall goe &c. by this grant I shall have no Common but when the grantor doth use his Common with his cattel &c.

Estovers.

By the grant of Estovers will passe houseboote, hayboote and plowboote: But if a man grant to me Estovers out of his Manor, I may not by this grant cut down any of the fruit trees within his Manor.

Park. Sec.
116.

Way.

If land be granted to me; hereby also implicitly is a way thereunto granted to me also: So that if one have 20 acres of land and grant me one acre in the midst of it, hereby *inclusus* there is granted me a way to it. And yet if a man have two Closes, and he use to goe over one of them for his ease to the other Close by a new way, and after he grant the further Close *cum pertinentiis*, by this grant the new way doth not pass.

14 H. 8. 4.
Clar. cas.
Trin. 5.
Jac. B.R.
Per Wil.
liams &
Yelverton.
Justices.
Mic. 3 Jac.

Forest, Park,
Chafe, Vivary,
&c.

If a man have a Forest, Park, Chafe, Vivary and Warren in his own ground, and he grant his Forest, Park, Chafe, Vivary or Warren; hereby not onely the priviledge but the land it self doth pass. But if the ground be anothers; or if it be his own and the grant

Co. Super
Lit. 5.
Rice &
Wiseman
case. Mich.
9-Jac.

be

be onely of the game &c. in these cases the land or soil it self will not pass.

Co. super
Lit. 4.

If a man be seised of a river, and by his deed doth grant *seperalem piscariam*, or *aquam suam* in the same, and maketh Livery *secundum formam carte*; by this grant doth pass onely a liberty to fish within the water, and not the soil nor the water it self: and therefore the grantor may take water still, and if it be dry he may take the soil also. And if one grant all his fish in his pond; by this is granted a power to come and fish for them, but the grantee may not hereby dig a trench and let out the water to take the fish, albeit they may not be otherwise taken.

Fishing.

Fitz. Barre
237.

Co. super
Lit. 4. Dier
285 Trin.
5. Jac. B R
accord.

If one be seised of 20 acres of land, and he grant to another, and his heirs the Vesture, or the herbage of it, and maketh livery of seisin in it *secundum formam carte*; by this grant doth pass the corn, grass, underwood sweepage, and the like; and for these things the grantee may have an action of Trespass for any wrong done to him in them. But hereby the land it self, the houses, and great trees thereupon, and mines therein do not pass. And if one grant the herbage or vesture of a wood; hereby is granted the grass and underwood onely, and not the timber of great trees. But if a man so seised of 20 acres of land grant to another the profits of this land To have and to hold to him and his heirs, and maketh livery *secundum formam carte*; hereby the vesture, herbage, trees, mines, and all whatsoever parcell of that land doth pass.

Vesture or
Herbage of
land.

Profits of
lands.

85 H. 6. 37.

If one grant to another all his deeds, or all his muniments, hereby will pass all his Charters, feoffments, leases, releases, confirmations, letters of Attourney, and the like.

Deeds.

Co. super
Lit. 118.
29 H. 6. 35.
Dier 59.
Perk. Sect.
115.
22 H. 8. 4.
Bro. Grant
96. 51.
Dier 39.
47. Dier
5. Co. 8.
83.

If one give or grant to another *Omnia bona*, or all his goods; by this doth pass all his moveable and immoveable, personal and real goods; as horses, and other beasts, plate, jewels, and household stuff, bowes, weapons, and such like; and his money, and his corn growing on the ground, also all the obligations and bills that are made to him, and in his own name do pass by this, but not the debts due by such obligations and bills. And some say that leases and termes of years of houses, lands, rents, commons, &c. rent-charge for years, wardship of tenants in Capite, and by Knights service, and the interests that a man hath by Statute Staple, Statute Merchant, or Elegit, do pass by this grant; but of this others doubt. And if a man give and grant to another *omnia catalla sua*, or all his chattels; hereby doth pass as much as by the grant of all his goods, and by this without question leases for years &c. do pass. But by neither of the grants do pass those goods or chattels which the grantor hath by delivery in keeping for another, or the like. Neither doth any estate of inheritance or freehold, or the charters concerning any freehold pass under these

Goods.

Chattels.

these words. Neither doth any thing in action, as debts or the like, nor hawks, hounds, poppinjays, or the like pass by this grant. And yet if an Excecutor grant *omnia bona & catalla sua*; hereby the goods and chattels he hath as Excecutor as well as his other goods and chattels will pass. And if one grant all his leases for years which he hath by any conveyances; hereby the leases for years which he hath as Excecutor as well as other leases for years will pass.

Utenfils.

If one grant to another all his Utenfils; hereby will pass all his household stuff, but not his plate, jewels, or any such like thing.

Grant of all a mans estate, right &c,

If a man be seised of land in fee simple or for life, and have an estate in it for years, by Statute Merchant, Staple, Elegit, or the like: and he grant all his estate, or all his right, or all his title, or all his interest of and in the land; by this grant all his estate, and as much as he is able to grant doth pass. And if a tenant for life of land, the remainder to the stranger in tail, the remainder to the rights heirs of the tenant for life do grant by these words; hereby both his estates do pass, and if a tenant in tail grant all his estate in the land; hereby there doth pass as much as he can grant. And all these words also do carry and pass reversions as well as Possessions. And if a man have a term of years of land, and he grant his term; hereby doth pass the term of years, and all his estate and interest of the land.

Note.

And note, That by all these names these things may be granted; and that for such things as are grantable without deed, when they pass by a verbal grant in any of these words, the words shall have the same exposition as they have in deeds.

If one grant all his goods in such a place *si qua fuerint*; by this grant nothing doth pass but the goods that are in such a place at the time of the grant, and not any other goods that shall be there afterwards.

If two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all their goods they have in common, and likewise all the goods they have in severally.

If two tenants, in common; or others severally seised of land, joyn in the grant of a rent of twenty shillings, or a horse, out of the land wherof they are so seised, by this grant the grantee shall have two twenty shillings or two horses.

If a man grant a rent of ten pound to me, To have and to hold during my life and my wives life, and after the death of my wife a rent of three pound to me for my life; in this case if my wife dye I shall have both the rents. But if there be any words of restraint or determination of the first rent, it may be otherwise.

If.

Adjudg. M.
20 Jac. B.
R. Burton
versus
Brown.

If one be seised of a garden plot in the parish of Sale, and grant it to *B* for ten years, which being expired he doth grant his garden-plot to *C* for twenty one years, and *C* doth build a house upon part of it, and leaveth the other part in a garden plot still, and after the twenty one years ended, the lessor doth grant to *D*, *totam illam peciam fundi sive garden ploti nuper in tenura de B & nunc de C*, lying in the parish of Sale, by this grant the house newly built, and the plot of garden doth pass.

Bro. Grant
53. 88. Doe
ne 36.

If one grant his Manor of Dale in Dale, which in truth doth extend into Dale and Sale; in this case no part of the Manor that doth lye in Sale shall pass. So if one grant all his tenements in Dale; hereby none of the tenements in Sale will pass. So if the Manor lie within the parishes of *A*, *B* and *G*, and the grant is of the Manor of Dale, lying within the parishes of *A* and *B*; by this grant no part of the Manor lying in *C* will pass. But if one seised of the Manors of *A* and *B* in the County of *C*, grant thus; *totum illud Manerium de A & B, cum pertin' in Com' C*, or *totum illud Manerium de A cum B in Com' C*, by these grants in case of a common person both the Manors will pass.

Co. 1. 46.

B. o. Grant
Plov.

If one grant all his lands in Dale which he had of the gift of *I S*; by this grant nothing will pass, but that which he had of the gift of *I S*. But if one grant all his lands in Dale called Hodges which he had of the gift of *I S*; by this grant all which is called Hodges shall pass, albeit the grantor had it not of the gift of *I S*.

Dockrales
case Pasch
22 Jac.

If one grant all his lands in the occupation of *I S*; by this grant doth pass not onely such lands as *I S* doth occupy by right, but also such lands as he doth occupy by wrong, and not onely the lands whereof he hath some estate, but also such lands as whereof he hath the pasturage onely.

a Jac. Br.

If one grant all his lands in *B*, and elsewhere in the County of *S*, in the tenure of *I S*; by this grant nothing doth pass but that which is the tenure of *I S*.

Adjudg
Seignior
Went-
worths
case. Co.
a. 46.

If one grant his Manor of *S*, *nee non omnes mariscos suos de S, ac omnia terra, tenementa &c. in S, & alibi dict' Manerio spectan'*; by this grant the marsh doth pass though it be no part of the Manor.

If one grant all his demesne lands of his Manor of Dale &c. it seems by this the customary land parcel of the Manor held by copy doth pass.

Adjudg
Hil. a. Jac.
B. R.
Baker's case

If one be seised of tythes which did belong to an Abby, part of which were gathered by the Almoner, and part not, and he grant *omnes & universales decimas granorum &c. infra dominium predict' & precinct' ejusdem, in dict' Comis'. Ac omnes alias decimas, proficua & commoditates &c. infra dominium predict' & dict' Monaster' &c. spectan' & quae nuper per Elemosinarios ejusdem Monasterii collecti fuer'*; by this grant shall pass all the tythes as well those that were

collected by the Almoner, as those which were not, and those words *que per Almoneriarum &c.* shall refer onely to the last, and not to both sentences.

If one grant all his lands in D, containing 10. acres, whereas in truth his lands there do contain 20 acres; by this grant the whole 20 acres will pass. Dier 80.

If one grant the Scite of an Abbie & *omnia terras prae pasturas & subscripsit cum pertinenis dicti Monasterii pertinenis &c. viz.* such a tithing and such a thing, &c. by this grant the grantee shall have all the lands belonging to the Monastery, and *viz.* shall relate to *Subscripsit* onely, and not to *omnia*. See more in Grant *infra* at Num. 4. and in Testament, at Num. 8. and in Fine, at Num. 6. Dier 70.

In the Exception. And how that shall be taken:

1. In the thing excepted.

The Exception is alwaies taken most in favour of the feoffee, lessee, &c. and against the feoffor, lessor. And yet it is a rule, That what will pass by words in a grant, will be excepted by the same words in an exception. And it is another true rule, That when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his Chapman to view them if he desire to sell them, and he or the Vendee, may cut them and take them away. And by such an exception the Lessor will have the boughs, fruit, hierons, and hawks, that breed in them &c.

Co. 10.
106. 14 H.
8. 1. 12. 54

If a man be seised of a fishing from such a Place to such a Place, and hath a mill upon the water, and he grant *totam partem suam piscariam de D quam diu terra sua se extendunt, salvo tamen stagno molendini*: this exception doth not take away the fishing of the grantee in the mill pond, but it shall have a relation onely to the pool to repair the mill.

Perk. Sed.
646. Fitz.
A. 11. 3. 16.

If a man seised of a Manor make a lease of it excepting all the saleable underwoods now growing, or which hereafter shall grow on the premisses, which have been usually sold by the owners of the Manor, with free entrie, egress and regress for the selling, making and carying away of the same at times convenient; in this case the soil is not excepted by reason of the subsequent words.

Hil. 16 Jac.
B. R. per
Judges.

If one be seised of a Manor and make a lease of it *cum pertinentiis et cum c. lumbis ac redditu tenentium, decimis garbarum, fructibus, heriotis perquisitis Cur & aliis omnibus proficuius, Advocat. Ecclesie & Wrecce* Excepti, in this the exception doth begin at *Advocat. Ecclesie*, and doth except that which followeth and no more.

Dier 98.

2. In the time.

If one grant in fee excepting the trees, or any other thing to the grantor without saying [and to his heirs,] by this exception the thing excepted is severed only for the life of the grantor, and then it shall pass with the rest of the things granted. But if the thing be excepted indefinitely without saying for the life of the grantor &c. nor how long, this shall be taken to be an exception during the estate.

Dier 204.

The

The *Habendum* as all other parts of a deed for the most part shall be taken most strongly against the grantor and most in advantage of the grantee, yet so as withall it shall be construed as near the intent of the parties as may be, as in all the cases following doth appear.

If land be given or granted to one *Habendum*, or to have and to hold to him and his heirs so long as he pay 20 l. yearly to *I S* and his heirs, or so long as such a tree doth stand, or the like; this is a kinde of fee simple, but it is limited and qualified and determinable upon this contingent. And yet this may become a pure fee simple, for if land be granted to one and his heirs until *I S* pay 100 l. and *I S* die before he pay it, in this case the estate is become a pure fee simple.

In the *Habendum* or limitation of the estate, and how that shall be taken.
Fee simple.

Co. super
Lit. 8. 9.
Lit. 1.
27 H. 8. 5.
Peik. Sect.
239. 240.
241. 39H.
6. 38. P low
28. B. 0.
Estates 4.
11 H. 7.
12. Co.
super Lit
15.

If lands be given or granted to a man, to have and to hold to him and his heirs, this is a fee simple, pure, absolute and perpetual, and this is made by these words [his heirs] for it is a general rule that these words [his heirs] only make an estate in fee simple in all feoffments and grants. But this rule hath many exceptions, for if feoffment of land be made to *I S & hereditibus*, without the word [*Suis*] this is a fee simple. And yet if the grant be to *I S* and *I D & hereditibus*, without this word [*Suis*] *contra*, for this is onely an estate for their lives. And if lands be given to a Bishop, Parson or the like, To have and to hold to him, and his successors; this is a fee simple. And lands be given to a Mayor and Communalty or other Corporation aggregate generally without the word Successors, or any other word, or if lands be given to such a Corporation for their lives, this is a fee simple. But if land be given to a Parson or the like To have and to hold to him, without saying how long; or to have and to hold to him for life; by this he hath no more but an estate for life. And if lands be given to the King generally without any other words; this is a fee simple. So if one grant *deo & ecclesia de D*; it is said this is a fee simple in the Parson of *D*. So also of a grant *Ecclesia de D per Thirino Inst*. So if a grant had been to the Monks of such a house it had been a fee simple in the house. And in like manner it is in other cases: As if one recite that *B* hath enfeoffed him of white acre To have and to hold to him and his heirs, and then he saith farther, That as fully as *B* hath given white acre to him and his heirs he doth grant the same to *C*, by this *C* the grantee hath the fee simple of this acre. And if one grant 2 acres to *A* and *B* To have and to hold the one to *A* and his heirs, & the other to *B in forma preditta*; by this *B* hath a fee simple in this other acre, for an estate in fee simple, fee tail, or for life, may be made by such words of reference. Also if a rent be granted between Parceners for to make an equality of partition, and it be granted generally and without any words of heirs, yet this is a fee simple. So where lands are given in *Frankalmoine*. And so

Co. 6. 27.
super Lit.
9.
15 Ed. 4.
13. 9 H.
7. 11. 12
H. 8. 9 H.
4. 84. 33
H. 6. 20.
Co. super
Lit. 9. Aff.
Pl. 2. Plo.
130. 14 H.
4. 13.

also it is in the cases of a release of right, a fine, and a recovery.

If one give or grant land to another To have and to hold to him and his heirs males, or to him and his heirs females, in both these cases there is a fee simple made, but otherwise it is when these words are in a Will, for then it is but an estate in taile onely.

27 H. 8. 11
27. Lit.
Sec. 31.
Co. 11. 46.

If one grant land to one To have and to hold to him and his right heirs; by this he hath a fee simple. And so it shall be taken if it be by fine. So if one grant land to *IS* for life, the remainder to the heirs, or to the right heirs of *IS*, this is a fee simple: so if one make a feoffment in fee to the use of himself for life, and after his death to the use of his heirs, this is a fee simple.

33 H. 6. 51

Co. super
Lit. 22. Co.
1. 95. 66.

If one grant land to *IS* To have and to hold to him and the heirs of *IS*; this is a fee simple, and all one with a grant to *IS* and his heirs.

If one grant land to another to have and to hold to him for 20 years, and that after the 20 years the grantee shall have it to him and his heirs by 10l. rent, and give livery of seisin: by this the grantee shall have the fee simple.

20 H. 6. 33.
Co. super
Lit. 217.

If one grant land to the wife of *IS* to have and to hold to her for life, and after to *IS* in tail, and after to the right heirs of *IS*, by this *IS* hath a fee simple, And if one grant land to *A* for life, the remainder to *B* for life, the remainder to the right heirs of *A*; by this *A* hath a fee simple.

Co. 1. 91.
Der. 156.
Co. super
Lit. 22.

If land be granted to a man and his wife, To have and to hold to them and the heirs issuing of them, it seems this is a fee simple and not a feetaile.

Br. Estates
86.

If land be granted to one and his heirs by the premises of a deed to have and to hold to him for life; by this he hath a fee simple. So if by the premises of a deed land be granted to one and the heirs of his body to have and to hold to him and his heirs; by this he hath an estate tail and a fee simple expectant, And so *via versa*. If by the premises of a deed the grant be to him and his heirs to have and to hold to him and the heirs of his body: by this also he hath an estate tail and a fee simple expectant.

Co. 2. 21.
24. super
Lit. 28.
21 H. 6. 37.

Fee tail.

If lands be given or granted to a man to have and to hold to him and to the [or his] heirs of his body, or the [or his] heirs males of his body, or the [or his] heirs females of his body; by this the grantee hath an estate tail. So if lands be given to a man to have and to hold to him and the heirs males, or to him and the heirs females of his body begotten: in both these cases it is an estate tail.

Terms. o
Law tit.
tail Lit.
tit. Fee
toto, and
in Co. su
per Lit. 266

If lands be given to a man and his wife to have and to hold to them and the heirs males, or to them and the heirs females of their two bodies begotten; by this they both have an estate tail. And if lands be given to them and the heirs males, or heirs females of the body of the husband begotten on the wife; by this he hath an estate tail and

Lit. idem
Co. 1. 40.
Co. super
Lit. 20. Co.
7. 41.

his.

his wife an estate for life only. And if lands be given to *A* to have and to hold to him and his heirs on the body of *B* begotten; by this *A* hath an estate taile and *B* hath nothing. So if lands be given to a man and his wife, to have and to hold unto them and the heires he shall beget on her body; by this they have an estate taile in them both. If lands be given to a man and his wife and the heirs of the body of the husband; by this the husband hath an estate in general taile, and the wife but an estate for life. If lands be given to him to have and to hold to him and his heirs he shall beget on the body of his wife; by this he hath an estate taile and she no estate at all.

Lit. Sect.
17.

If one give his land to his daughter or Cousin in Frankmari-ge; by this they have each of them an estate taile without any word of [heires, or heires of body] &c.

Co. Super
Lit. 21. Co.
7. 41. 5 H.
53. 6.

If one give lands to *B* and his heires, to have and to hold to *B* and his heires, if *B* have heires of his body, and if he die without heires of his body, that it shall revert to the donor; by this *B* hath an estate taile. So if one give lands to *B* and his heires if he have issue of his body; by this he hath an estate taile. So if lands be given to *B* to have and to hold to him and his heires, provided that if he die without heire of his body that the land shall revert. So if lands be given to *A* & *Buxorijus* & *hered' eorum* & *aliis hered' ipsius A*, si *dict' hered' de dict' A* & *B exsunt* obierunt *sine hered' de se* &c. by this they have an estate taile. And so in all such like cases where after a limitation of a fee simple these or such like words are added, viz. That if he die without heires of his body the land shall revert, for in all these cases the *habendum* is construed to be a limitation or declaration what heires are meant before.

Co. Super
Lit. 26.
Plow. 135.

If lands be given to *A* and *B*, (a young man and maid unmarried) to have and to hold to them and the heires of their two bodies; by this each of them hath an estate taile, and if they marry their heires may inherite it

Co. Super
Lit. 7. Co.
8. 87.
Aff. pl. 147.
5 Aff. 14.

If lands be given to the sonne to have and to hold to him and his heires of the body of his Father; by this the sonne hath a fee-simple. But if the words be to have and to hold to him and the heires of the body of the Father engendred; by this it is an estate taile in a deed as it is in a Will. And if the Father be dead the Law is so also, but it seems the sonne shall have by this only an estate for life except he be issue in taile to his father *per formam doni*. So if there be grandfather, father and sonne, and the father dieth, and lands be given to the son to have and to hold to him and the heires of the body of the grandfather; this is an estate taile in the sonne: but neither the father nor the grandfather have either of them any estate in these cases. If lands be given to *I S* and the heires of the body of his wife (being dead) begotten; by this *I S* hath an estate taile.

Will.

22 H. 4. 1.

H 4

If

If one grant lands to *I S.* to have and to hold to him and the heires of his body issuing, the remainder to *I D* and his heires *in forma prædicta*; by this *I S.* and *I D.* after him have each of them an estate taile.

Co. super
Lit. 385.

If one grant lands to *A* to have and to hold to him for life, the remainder to the first sonne of *A* and the heirs males of the body of that first sonne; by this the first sonne hath an estate in taile, and *A* his father but an estate for life only. But if lands be granted to *A* for life the remainder to the heires of the body of *A*; by this *A* hath an estate taile in him. And if lands be given to a man and his wife to have and to hold to them and one heire of their bodies lawfully begotten, and to one heire of the body of that heire; by this there is an estate taile made, yet so as it shall last only during the lives of those two heires.

Co. 2. 91.
super Lit.
22. 39. All
Plow. 20.

If one grant lands to another to have and to hold to him and to his heires of the body of such a woman lawfully begotten; by this he shall have an estate taile, for begotten shall be intended by the donee on that woman.

Co. super
Lit. 26.

If there be husband and wife and they have issue a sonne and daughter, and lands are given to the wife to have and to hold to her and the heires of her late husband on her body begotten; by this the wife hath an estate for life and the son an estate in taile, and if he die without issue it shall goe to his daughter, *per formam doni*.

Co. super
Lit. 26.

If lands be granted to the husband of *A* and wife of *B*, to have and to hold to them and the heires of their two bodies; by this they have each of them an estate in taile in them; for there is a possibility that one husband and wife may die, and then the other husband and wife may intermarry.

Co. super
Lit. 20.

If there be father and sonne, and lands are given to the father to have and to hold to him and the heires of the body of his son; by this the sonne hath an estate taile but the father as it seems but an estate for life.

12 H. 4. 3.
Dier 274.

If lands be given to the mother for life, the remainder to her son and the heires of the body of his father on her begotten (the father being dead) by this the son hath an estate taile.

Lit. Sect.
352.

If lands be granted to *I S.* to have and to hold to him and the heirs he shall happen to have of his wife; by this he hath but an estate taile and no fee simple, and his wife hath no estate at all.

12 H. 4.

If lands be granted to *I S.* and the heirs that the said *I S.* shall lawfully beget of his first wife, and he hath no wife at the time of the grant; by this he hath an estate taile.

Co. super
Lit. 20.

If *A* have issue by *B* his wife, *C* a son and *D* a daughter, and *A* die, and lands are granted to *B* to have and to hold to her and to the heires of *A* her late husband on her body begotten; in this case and by this deed *C* hath an estate taile and the woman hath only

Co. super
Lit. 26.

an estate for life, and if *C* die without issue, *D* his Sister shall have the land *per formam doni*. But if one grant lands to *A* late wife of *I S* to have and to hold to the said *A* and the heires of *I S* on the body of the said *A* begotten; in this case the son and heir shall take no estate by the grant. And the same construction shall be upon the same words in his Will. *¶* *si quis si fuit noster puer & habundum.*

Co. super
Lit. 26.

If lands be granted to the husband and wife, to have and to hold to them and the heires of the body of the survivor of them; by this the survivor shall have an estate taile after the death of the other.

Vill.

Co. super
Lit. 20.

If lands be granted to *I S* to have and to hold to him & *heredibus de carne sua*, or *heredibus de se*, or *heredibus quos sibi contigerit*, in all these cases *I S* hath an estate taile and no more.

Co. super
Lit. 28.

If lands be granted to husband and wife, to have and to hold to him and the heirs of the body of the husband, the remainder to the husband and wife, and the heirs of their two bodies begotten, this remainder is void, and therefore by this the husband hath an estate in taile, and the wife a joint estate for life with her husband and no more.

Co. 1. 140.

If lands be granted to *I S*, and the heires of the body of *Iane a Noke* begotten; by this *I S* hath an estate taile and no more.

Co. super
Lit. 20.

If lands be granted to *I S* & *heredibus de corpore procreatis*; by this the heires that shall be begotten afterwards shall take. And if lands be granted to *I S* & *heredibus de corpore procreandis*; by this the heires of his body before begotten shall take *per formam doni* as well as those that shall be begotten afterwards.

Co. super
Lit. 146.

If one grant to *I S* that if he and the heires of his body be not yearly paid 40 s. that he or they shall distrain in the lands of the grantor, by this the grantee hath an estate in taile in the rent, as if he grant to *I S* that he and his heires be not paid, &c. that he or they shall &c. he hath a fee simple in the rent.

Lit. 80.
283. 285.
Co. 8. 85.
96. 2. 24.
Finches
Law 60.
Co. super
Lit. 9.
Dier 307.
Co. 7. 23.

If one give or grant land to another to have and to hold to him, or to him and his assignes, and say not how long nor for what time, and the grantor make livery of seisin according to the deed; by this the grantee hath an estate for his own life. But if no livery of seisin be made no estate at all but an estate at will doth pass by this deed. And if he that doth grant the land be but a lessee for years of the land, and he make no livery of seisin upon the grant; by this his term of years and that estate which he hath is granted. But if he make livery of seisin upon the grant then an estate for the life of the grantee will pass, and it is a forfeiture of the estate of the lessee for years of which he in reversion may take present advantage. And if one grant to another Common in his land when he doth put in his own beasts, or Estovers in his Manor when he commeth there, and say no more, by this it seems the grantee hath an estate for life.

For life.

17 Aff.
11. 17.

Forfeiture.

If one grant land to *I S* to have and to hold to him or his heirs, Co. 5. 112. Super Lit. 8. in the disjunctive; this is but an estate for life and no more. So if one grant lands to *I S* to have and to hold to him and his heir, in the singular number; by this *I S* hath only an estate for life and no fee simple.

If one bargain and sell land to another for money, and limit no time and express no estate; by this the bargainee shall have only an estate for life. But otherwise it was before the Statute for uses, for then it had been a fee simple. Co. 8. 87. 83. Plow. 539.

If lands be granted to *I S* for life, and after to the next heir male of *I S* and the heirs males of the body of such next heir male, by this *I S* hath but an estate for life. But if it be to the next heirs males of *I S* it is an intail. Co. 1. 66.

If one grant land to *I S* to have and to hold to him in fee simple, or in fee tail, without saying [to him and his heirs, or to him and his heirs males or the like] this is but an estate for life and no more. So if one grant land to *I S* to have and to hold to him and his seed, or to him and his issues generally without more words; by this is made only an estate for life. But in the construction of a Will the land is otherwise in most of these cases. 20 H. 6. 33. Co. Super Lit. 8. 20.

If lands be granted to two & *hered bus* without this word [*SNM*] by this they have an estate for their lives and no longer. 20 H. 8. 35.

If one grant lands to *I S* to have and to hold to him and his heirs for his own life, or for the life of *I D*; by this *I S* hath an estate for life and no more. Co. 5. 112. 1. 140.

If one grant lands to *A* and *B* *Habendum sibi & suis* omitting all other words, or to have and to hold to them and their assigns; by this they have an estate for life only. So if lands be granted to any natural person to have and to hold to him and his Successors; by this he hath only an estate for his life. Co. 4. 29. Super Lit. 1. 8.

If one grant his lands to *I S* to pay his debts to have and to hold to him generally without limiting any estate; in this case *I S* hath an estate for life only. Co. 8. 96.

If lands be granted to *A* and *B* to have and to hold to them for their lives to the use of *C* for his life; by this *C* hath an estate for his life if *A* and *B* live so long. Dier 186.

If a tenant in tail grant *totum statum suum*, by this the grantee hath an estate for the life of the grantor and no longer. And if a lessee for life grant all his estate; hereby his estate for life doth pass, for this is as much as he can lawfully grant. Lit. Sect. 613. Co. 1. 53. Super Lit. 345.

If a man have a son and a daughter and die, and lands be granted to the daughter and the heirs females of the body of the father; it seems by this she hath only an estate for life. Plow. 562. 163. Co. Super Lit. 24.

If one grant land to another to have and to hold to her whiles she shall live sole, or during her widowhood, or so long as she shall be. Co. Super Lit. 48. 234. 235.

behave her self well, or so long as she shall dwell in such a house, or so long as she pay 10 l. yearly, or so long as the coverture between her and her husband shall continue; or one grant lands to a man to have and to hold unto him until he shall be promoted to a Benefice, or the like: in all these cases if livery of seisin be made according to the deed, or if the grant be of such a thing whereof no livery is requisite, the grantee hath an estate for his life and no more, and that determinable also.

If one grant lands to *IS* to have and to hold to him for life, and doth not say for whose life; this regularly shall be taken for the life of *IS* the lessee, and not for the life of the lessor. But if the lessor himself have but an estate for life in the lands granted, then the lease shall be construed to be and to enure during that life onely by which the lessor did hold to prevent a forfeiture. And if he that doth make the lease be tenant in tail of the land, this shall be taken to be a lease for the life of the lessor. And if a tenant for life of land make a lease for years of it, and then grant his reversion by the name of a reversion to another To have and to hold to him and his heirs; by this he hath only an estate for the life of the grantor and no more. So if tenant in tail of land grant it to one for years, and after grant his reversion to another To have and to hold to him and his heirs; this shall be construed to be an estate for the life of the tenant in tail and no longer, and the attornment of the tenants in these cases will not alter the cases. And so it is in case of a release also, as if tenant in tail doth release to *B* (being lessee for years of the land) all his right to the land, this shall be taken to enure but for the life of the tenant in tail and no longer, as if a man retain a servant; and say not how long; this shall be taken for a year, *Constructio legis non facit injuriam*.

If one grant to *IS* that if he be not paid yearly for his life 40 s. that he shall distrain in the land of the grantor for it; by this *IS* hath an estate for life in the rent. And if a man by his deed grant a rent of 10 l. issuing out of all his land quarterly at the usual feasts, this is an estate for life of the grantee.

If one grant lands to *IS* and *ID* To have and to hold to them during their lives, omitting these words [and the longest liver of them] by this notwithstanding they shall hold it during the life of the longest liver of them. And if lands be granted to *A* To have and to hold to him during the lives of *B*, *C* and *D* without any more words; by this *A* hath an estate during all their lives, and during the life of the longest liver of them. * And if lands be granted to *A* To have and to hold to him during his life, and during the lives of *B* and *C*, by this he hath a lease for his own life and the lives of *B* and *C* and the longest liver of them. But if a lease be made to *IS* of land to have and to hold to him during the time that

Co. super
Lit. 183.
42. Plow.
161.
F. N. B.
168.

Co. super
Lit. 147.
Co. 8. 85.

Co. 5. 9.
11. 3.

* 38 Elis.
B. R. in
the case of
Rofs and
Adwick.

Occupant.

that *A* and *B* shall be Justices of Peace, or during the time that *A* and *B* shall be of the Inner Temple, or the like; in these cases the failer of one doth determine the estate. And if a lease be made to *B* onely to have and to hold to him and *C* for their lives; by this *B* hath an estate for his own life onely and no more, and *C* hath nothing at all. And here by the way let it be observed in these and such like cases where lands are granted to one man to have and to hold to him [or to him and his assigns, or to him, his executors, administrators and assigns] during the life, or during the lives of others: and in most cases where a man is tenant *pur auter vie*, i. for the life or lives of another or others, if the tenant *pur auter vie* in possession die, his estate shall not go to his heirs, executors or administrators, unless they can first get into possession after his death, but he that can first get into the possession of the land after the death of the tenant *pur auter vie* shall have it for his life, and after his death then he that can first get into the possession again, &c. And therefore if the land were let by the tenant *pur auter vie* at the time of his death to any undertenant for years, or for one year, or at will, and this undertenant be in possession at the time of the death of the tenant *pur auter vie*, this undertenant shall have it for his life, if the life or lives by which it is held so long live, for the rule in this case is *occupanti conceditur. Et capiat qui capere potest*. And this estate is called an Occupancy, and he that hath it an Occupant. To prevent which mischief the lessee must take care when he takes his lease, to have it made to him and his heirs during the life or lives of him or them by whom it is held, for in this case after his death his heir and none other shall have it; or if this be neglected, then he must take care to grant over his estate by a *fe* executed (for by his last Will he may not devise it) to some friend and his heirs in trust for him; or he may grant it over to another, and take a regrant of it to himself and his heirs; or he may make a lease for years of the lands to some friends in trust, and by this means he may have the fruit of it during the term

For years,
When such a
lease shall be-
gin, and how
long it shall
continue.

When no time is set down for the beginning of an estate then it shall begin presently, otherwise it shall begin at the time expressed if it may stand with law. If a lease for years be made bearing date the 26 day of *May*, To have and to hold for 21 years from the date, or from the day of the date; in these cases the lease shall begin on the 27 day of *May*. But if the words be To have and to hold from henceforth, or from the making hereof, in these cases the lease shall begin on the day in which it is delivered. And if it be to begin *à die confessionis*, then it shall begin the next day after the delivery. And if it be To have and to hold for 21 years, without mentioning when it shall begin, it shall begin from the deli-

Adjudged
B. R. 4
8 Eliz. Ho.
bart &
Wilemors
case.

Co. Super
Lit. 44. 239.
388.
Plow. 556.
28 Dier
328. 334.
264.
Co. 10. 98.

Co. Super
Lit. 46.
Co. 5. 14.
5. Dier 26.
307.

very

very if there be no former lease in being, and if there be, then it shall begin from the time of the ending of that lease. If the deed have a date which is void or impossible, as the 30 of February, or 40 of March, and the term be limited to begin from the date, then it shall begin from the delivery. So if a man by his deed recite a lease which is not, or which is void, or misrecite a lease that is in esse in point materiall, and then say to have and to hold from the end of the former lease; this lease shall begin in course of time at the time of the delivery of the deed.

Co. 1. 754.
Plow. 198.

If one make a lease of land to A for 20 years, and then grant it to B To have and to hold to him from the end of the first term &c. in this case this second lease shall begin assoone as the first lease by what means soever shall end. But if the words of the second lease be To have and to hold to him from the end of the 20. years, in this case the second lease shall not begin untill the 20. years be expired. And if one make a lease of white acre to A for 10. years, and of black acre to B for 20. years, and then reciting both the leases, doth make a lease to C to begin after the former leases; this shall be taken respective, and shall begin for white acre after the end of the 10. years, and for black acre after the end of the 20. years. And if one make a lease to two for 60. years, provided that if the lessees shall die within the term, that then presently after the decease or the last of them longest living the lessor shall reenter, and one of them die, and after the lessor doth make a lease to another *Habendum &c. cum post five per mortem sursum reda vel foris salturam* of the first surviving lessees *acciderit vacare* for 40. years; in this case this second lease shall begin after the death of the lessee surviving, reentry of the lessor, or the effluxion of time of the first lease which of them shall first happen, and the lessee cannot at his Election make it to begin at any other time.

Co. 6. 36.

Dier 261.

If a man make a lease for 30. years, and 4 years after make another lease to another man in these words. *Noveritis &c. me A de B prediitis 30. Annis suis dedisse & concessisse B de C &c. Habendum a die consecrationis presentium termino predicto finito usque finem 31. Annorum*; by this the second term shall begin at the end of the 30. years. And if one make a lease to A for 20. years and after make a lease to B to have and to hold to him from the end of the first term for 20. years to be accounted from the date of the last deed, in this case the second lease shall begin at the end of the first lease, and these words [to be accounted &c.] shall be rejected.

Graddocks
case Plow.
7. Jac. Co.
B.

Dier 112.

If one make a lease of land to A for 10. years, and after by indenture grant it to B to have and to hold to him from Michaelmas next for 10. years, and after the first lessee doth purchase the reversion by which his term is drowned; in this case the second lease shall begin presently when Michaelmas is come.

If

If two Joyntennants be, and one of them grant the land to I S to have and to hold to him for 20. years if the leffor and his companion fo long live; by this the leafe shall continue no longer then they both live together, and when either of them is dead the leafe is determined. And if one grant his land to I S to have and to hold to him, his executors &c. for the term of 100. years if A, B, and C live fo long, and leave out thefe words [or either of them] in this cafe if either of them dye the leafe is determined. But if the words be to have and to hold for 100 years if A, B or C [omitting or either of them] shall live fo long, *contra*. If a leafe be made of land to the husband and wife to have and to hold to them for 21 years if the husband and wife or any child between them shall fo long live; this is a good leafe and shall continue for all their lives, and for the life of the longest liver of them, albeit the first words be in the copulative.

If one possessed of land for a term of years grant the same to another, to have and to hold to him, his executors and Administrators, or to him and his assignes, or to him, without any more words: or if a man that is possessed of a term grant his leafe to another, and doth not say for what time; it seems in these cafes the whole term is granted albeit no livery of seisin be made. And in the first case if livery of seisin be made then it seems there doth pass an estate for the life of the grantee, and therefore that this is a forfeiture of the estate of the lessee for years whereof he in the reversion may take advantage presently. And if a lessee for years of land grant a rent out of the land generally without any limitation; this shall be construed to enure for a grant of the rent so long as the estate of the grantor doth continue. But if he grant a rent by express words, for the life of the grantee: by this the grantee shall have it for all the term if he live so long.

If one grant lands to I S To have and to hold to him for life reserving the first seven years a Rose, and if he will hold the land over that he shall pay a rent in mony, and no livery of seisin is made, by this it seems in certain is made a leafe for seven years untill the Condition be performed; and then also it seems it is a leafe for no longer time. And so perhaps it will be if livery of seisin be made.

If one grant a rent of 5 l. *per annum* unto I S, To have and to hold to him &c. untill he shall receive 20 l. in this case he shall have a leafe for foure years of this rent. But if lands be granted to I S to have and to hold &c. untill he shall receive 20 l. out of the profits of it, in this case if livery or seisin be made, the grantee hath an estate determinable upon the leavying of the mony, and if no livery be made he hath no estate at all but at will.

If one make a leafe for life and say, that if the lessee within one year

Mich. 23.
Jac. B. R.

Co. 5. 9.

Pash. 30.
EHz. Co. B.

Dier. 307.
69 Plow.
320. 524.
525. 423.
424. Co. 7.
23.

Co. super
Lit. 218.

Co. super
Lit. 42.
Plow. 273.

Co. super
Lit. 218.

year pay not 20s. that he shall have but a term for two years; by this if he doth not pay the money he hath onely a lease for two years, albeit livery of seisin be made upon it.

Co. 9. 63.
60. If one make a lease to I S To have and to hold to him, his executors &c. for 10 years if I D should live so long, and I D is dead at the time when the lease is made; in this case I S hath an absolute lease for 10 years.

Plow. 293.
Co. super
Lit. 45.
Dier 24. If one grant lands to I S To have and to hold to him, his executors &c. for 3 years, and so from 3 years to 3 years during the life of I S, or from 3 years to 3 years during the life of the lessee; by this it seems I S hath a lease for 6 years and no more. And if one grant lands to I S To hold for 3 years, and after the end of those 3 years for 3 other years, and after the end of those 3 years for 3 other years during the life of the lessor; by this it seems I S hath a lease for 9 years and no more. And yet if in these and such like cases where a lease is made from so many years to so many for the life of any person, livery of seisin be made upon this deed *secundum formam chartae*; this perhaps may be an estate for life.

14 H. 8. 10
Co. 6. 35.
30. 106. If lands be granted To have and to hold from our Lady day *pro termino unius Anni & sic de uno anno in unum Annum quamdiu ambabus partibus placuerit*; by this the grantee hath a lease for 3 years onely in certain, and afterwards a lease at will. And if lands be granted to have and to hold from the Nativity of Christ next *pro termino unius Anni, & si in fine dicti unius Anni amba partes placeant quod eadem presens demissio foret renovata, tunc habenda premissa* to the lessee &c. *ab eo post festum Nativitatis Domini usque terminum trium Annorum extunc prox' sequens*; by this the grantee hath a lease in certain but for one year onely, and if the parties agree again a lease for 3 years.

Co. 6. 35.
21 H. 7. 38. If one make a lease to I S To have and to hold to him for years, and say not how many years: by this the lessee hath a lease for 2 years and no more.

Co. 3. 19. If one grant his land to I S To have and to hold to him until I D shall come to 21 years of age; in this case if I D dye before that time the lease is ended.

Co. 1. 44.
7 H. 4. 42. If a man possessed of a term of years of land doth grant the land to another and his heirs, this by construction will amount to a good grant of his interest.

Dier 263. If lands be granted to husband and wife and to I S To have and to hold to them and to their heirs of the husband and I S; by this the wife hath onely an estate for life in a moiety with her husband, and the husband and I S have the fee simple in 70 yers tenancy to them and their heirs. Limitation of estates to divers persons.

Co. 2. 87.
20. 50. super
Dier 245. If lands be granted to two brothers, or two sisters, or to a brother

brother or fitter, or to a father and fon or any others, To have and to hold to them and the heirs of their bodies begotten: by this they have joynt estates for their lives, so that the survivor of them will have the whole for his life, and several inheritances. i. estates in general tail by moities in common one with another. And if lands be granted to two men and their wives and the heirs of their bodies begotten: in this case they have joynt estates for life, and afterwards the one husband and wife shall have the one moiety, and the other the other moiety in common. And if lands be granted to a man and two women to have and to hold to them and the heirs of their bodies, by this they have each of them an estate tail in common with the other.

If lands be granted to husband and wife To have and to hold to them and their heirs of their bodies issuing, or in any such like manner; by this the wife hath an estate tail as far forth as the husband. But if it be granted to them to have and to hold to them and the heirs of the body of the husband, or to the husband and wife, and the heirs of the husband which he shall have by his wife, or in any such like manner; by this the wife hath onely an estate for life, and the whole estate tail is in the husband. So *via versa* if lands be granted to husband and wife, and the heirs of the wife upon her body begotten by the husband: by this he hath an estate for his life onely, and his wife the whole estate tail. And if lands be granted to the husband to have and to hold to him and the heirs of his body on the body of his wife begotten, or To have and to hold to him and the heirs of his body begotten on the wife he shall first marry, or To have and to hold to him and his wife he shall first marry, and the heirs of their bodies begotten: in these cases the husbands have the whole estate and the wives nothing at all. But otherwise it is it seems when the estate is limited by way of use to a man and his wife that he shall afterwards marry, for by this it seems the wife shall take also.

Use.

If lands be granted to *A* a married man, and to *S* a married wife, and to the heirs of their bodies engendred: by this they have each of them an estate tail presently executed, and whiles the wife of the husband and the husband of the wife live they shall hold it for their lives, and if they happen to dye and these to intermarry and have issues, their issues shall have it according to the intail.

When the *Habendum* shall be said to be repugnant and void. And when not, but shall control, divide or expound the premises.

If lands be granted to *A* and *B* To have and to hold to *A* for life, the remainder to *B* in fee: by this *A* shall have the whole for his life and *B* the fee simple afterwards

As Touching this matter, these differences are to be taken: Between things that are granted and between the estates. When the things that are granted are such as lye in grant and take effect by the delivery of the deed onely without any ceremony, or take effect

Lit. Sed.
27. 28. 29.
Co. Super
Lit. 26.
Dier. 340.
Co. 1. 100.

15 H. 7. 100

Dier 126.
56.

Co. 1. 23.
8. 56.
Perk. Sed.
181.
14 H. 8.
24. Co.
Super Lit.
183.

effect by the same ceremony, and when not but another ceremony is required to the perfection of the grant and estate. And when there is an expresse estate made by the deed in the premises thereof, and when but an implied estate onely. as for examples, If one grant land, rent common, or any such like thing to one and his heirs by the premises of the deed To have and to hold to him for life, or To have and to hold to him and to his assigns without more words, in this case the *Habendum* is repugnant and void, and by this the grantee shall have an estate in fee simple of livery of seisin and attornment as the case doth require, be it duly made, for otherwise no estate at all but at Will will pass. So if a man grant a rent, or any such like thing that lieth in grant to one and his heirs To have and to hold to him for years, this is a void *Habendum*, and the grantee shall have the fee simple. But if a man grant land to another and his heirs To have and to hold to him for a certain number of years, in this case whether he make livery of seisin or not it is a good *Habendum*, and by this the grantee shall have an estate for so many years and no more. So if one grant land, rent, common, or any such like thing to one in the premises of the deed without limitation of estate (which in judgement of law is an implied estate for life) To have and to hold to him for a certain number of years, or at will, this *Habendum* is good and shall stand with the premises and qualify it; and by this the grantee shall have but a lease for years, not at will, as the *Habendum* is. And if one grant land by the premises of a deed to one and his heirs of his body. To have and to hold to him and his heirs; this *Habendum* shall stand, and this shall be taken an estate tail and a fee simple expectant. So *vice versa*, if land be granted to one and his heirs, To have and to hold to him and his heirs of his body, this shall be construed an estate tail and a fee simple expectant, and so both shall stand together.

If lands be given to B and his heirs To have and to hold to B and his heirs, and if he dye without heirs of his body that it shall revert to the donor, it seems this is a fee tail onely, and no fee simple expectant. *Voluntas donatoris in carta doni sui manifeste expressa observanda est.*

If a lease for years be made of land, and then the lessor by the premises of the deed granteth the land to another To have and to hold the reversion, of the land to him, &c, for life; this *Habendum* shall stand. So if by the premises of the deed the reversion be granted To have and to hold the land it self, this is good and both shall stand together, but nothing is granted in either case but the reversion.

If the next Advowson of a Church be granted to three To have and to hold to them and either of them jointly and severally; this is joint and the *Habendum* is void. And yet if one grant land to two by

Co. B. 154.
21 H. 6. 7.
Co. super
Lit. 20.
Dier 126.
& per curiam in
Thurmans
case. Pasch.
16 Jac. B.
R.
21 H. 6. 7.
Co. super
Lit. 21.

Go. 10. 107.
108.

Dier 304.
Co. 5. 19.
Co. 2. 55.

the Premises of the deed To have and to hold to one of them for life, the remainder to the other for life; this is not repugnant but shall stand together and make the estates several and in remainder one after another. So if a lease be made to two To have and to hold the one moiety to the one and the other moiety to the other; by this they have several estates. *Expressum facit semper cessare tacitum*

If a man have a lease for years of land, and he reciting this, by the Premises of the deed doth grant all his estate in the land, To have and to hold the land or the term after his death, or for part of the time onely; in this case the *Habendum* is void and the whole estate doth pass immediately by the premises.

If a tenant for life surrender a moiety of his land and the lessor grant it all to a stranger To have and to hold the one moiety for life and the other moiety for 40 years after the death of the tenant for life; this *Habendum* shall stand and enure according to the grant.

If a man seised of land in fee make a lease for life of it to one and after grant the reversion of it to another To have and to hold, the reversion and the tenements aforesaid *cum post mortem foris facti &c. vacare accideris*; in this case the *Habendum* and premises may stand together. It is usual in the *Habendum* of a deed to set down to what use the party to whom the deed is made shall have the thing granted. But touching this and the matters that do concern Uses, see *Use infra* at large. And see also more for the *Exposition of Deeds in Testaments Numb. 8. Grant Numb. 4. Leases cap. 14. Numb. 4.* And here note, That Parol agreements and conveyances have the same construction for the most part made upon them as are made before upon deeds. And therefore if a man by word of mouth without any writing grant all his lands in Dale to J S To have and to hold to him for life, but doth not say for whose life; this shall have the same construction as such a grant made in writing hath.

Note.

In the reservation of rent. And how that shall be taken.

This is alwaies taken most in advantage of the feoffee, grantee, lessee, &c. and against the feoffor, grantor, lessor, &c. and yet so as the rent be paid during the time. And therefore if the reservation be onely to the feoffor, grantor, &c. and the deed do not say also [to his heirs, executors, &c.] this reservation shall continue onely for the life time of the grantor and shall determine with his death. And so also it is where the reservation is to the feoffor or his heirs, in the disjunctive, for in this case the rent shall continue only during the life of the grantor. And yet if one make a lease for years rendering yearly during the said term to the lessor or his heirs or executors, this is a good reservation during all the term, by reason of these words [during the term.] So if the feoffor or lessor be seised

Super Lit.
183.
Dier 106.

Dier 272.
Plow. 320.

Dier 256.

Curia pal.
7 Jac. Co.
B.

Co. 5. 111.
20. 106 B.
71. Co.
super Lit.
47. 213.
214.

Flow. 171.
21 H. 7. 25.
27 H. 8. 19.
Dier 45.

seised in fee, and make a feoffment in fee, or lease for life or years, rendring rent to the feoffor or lessor or his executors or assigns; in this case the rent shall continue only for the life of the lessor. But if the reservation be to the feoffor, or lessor, his heires and assignes, in the copulative, or in the disjunctive to him or his heires, or to him and his successors (if it be the lease of a Corporation) during the term; then all the assignees of the reversion shall enjoy it. And if the reservation be thus, yeelding and paying so much rent (without any more words,) this shall be taken for all the time of the estate and shall go to him in reversion accordingly. And if the reservation be, rendring so much rent during the said term, and doth not say to whom; in this case it shall be construed to be to him that hath the reversion and accordingly it shall be paid and shall continue during the term. But if *A* be seised of land in fee, and make a lease for years of it rendring rent to *A* [without saying To his heires &c.] during the said term; this rent shall continue only during the life of *A* and no longer. And yet if *A* be possessed of a term only, and make an under-lease or assignement with such a reservation; *Quere.*

So held in
the case of
Blond M.
8 Car. B.
R.

27 H. 8. 19.

If the reservation be thus, Yeelding and paying 20 s. during the said term, omitting the word [yearly] this shall be taken, to be not once only but yearly during the term and accordingly it must be paid. And if a lease be made for years, rendring in every middle of the year, *quolibet medio Anni* 20 l. this shall be paid during the term.

Pl. at Jac.
Hudion &
Brent B.
R. Co. 10.
107.

If one by deed indented grant lands to *A* To have and to hold to him for life, the remainder to *B* and the heires of his body, and for default of such issue to remain to *D* in taile, or for life, yeelding therefore yearly &c. in this case the reservation shall extend to all the estates.

Dier 130.
Co. 5. 111.
Super Lit.
217.

If a lease be made the 10 day of *August*, rendring rent at our Lady day and Michaelmas; in this case albeit our Lady day be first named, yet the first payment shall be at Michaelmas next after the making of the deed.

Per. Willi.
ams &
Yelverton
Just. Ch.
Just. con-
tra. 9. Jac.
B. R. Co.
10. 106.

If the reservation be at Michaelmas or within 20 daies after : in this case the 20 day shall be taken exclusive. But if the rent be to be paid at Michaelmas or by the space of 20 daies after, in this case the 20 day shall be taken inclusive.

If a lease be made in *December*, from the Nativity of Christ next for one year with this addition, *Et si in fine dicti Anni amba partes agreeant quod eadem dimissio foret renovata tunc habenda & tenenda premissa dicto I S* (the lessee) *ab & post dictum festum tunc proxim. sequend. usque finem trium Annorum. Reddendo inde Annuatim durante dicto termino dict. W S. &c.* in this case the reservation shall relate to both the terms, and the rent shall be paid the first year although they do not agree to renew the lease,

If two Jointenants by deed poll, or by word make a lease for life reserving a rent to one of them; this shall go to them both. So if one of them be tenant for life and the other in fee, and they joine in a lease for life, or gift in taile reserving a rent; the rent shall enure to them both. But if tenant for life and he in reversion joine in a lease for life, or gift in taile by deed reserving a rent, the rent shall enure to the tenant for life only during his life, and after to him in reversion.

Co. super
lit. 214.

If two tenants in common make a lease of their land rendring 20 s. rent; this shall be but one 20 s. and not two 20 s. So if the lease be rendring a Hawke or a Horse; by this they shall have but one Hawke, and one Horse, and not two Hawkes or two Horses, as it shall be in cases where they do joyn in the grant of such things out of their land.

Plow, 171.
289.
Co. 10.
106.

If one make a gift in taile of two acres of land, the one at the common law and the other in Burrow English rendring an ox to him and his heires, and the donee having two sonnes die, and the eldest son doth inherit the one acre, and the youngest son doth inherite the other; in this case the donor and his heires shall have but one ox, &c.

Co. 10. 106.

If one make a lease of land for years if the lessee live so long, and after the lessor by his deed indented doth grant the land to another. To have and to hold the reversion to the grantee for his life, *cum post mortem &c. ann aliter acciderit vacare reddend inde Annuatim* to the grantor and his heires *cum reversione predicta acciderit* 9 s. 4 d. per Annum; in this case this reservation of rent shall not begin before the reversion happen in possession.

Co. 13 107.
108.

If rent be reserved to be paid at two terms, and it is not said by equal portions; yet it shall be so taken and it must be so paid.

13 H. 4.
Avovery
247.
Co. 8 95.
10 47 B.
Done 57.
Fitz. Done

In other respects.

Devise.

If one be possessed of a term of years of land, and grant it by deed to *I S* for his life, and after his death to *I D*; in this case the whole terme is granted to *I S*; and his executors, administrators and assigns shall have it and not *I D*. But if a term were so devised by Will, *contra*. And if one give or grant to another his horse, or his books for his life, and that after his death they shall remain to another, the remainder is void, and the first shall have it for ever, for the gift or grant of such a thing for an houre, is a gift of it for ever.

Remainder.

See more in Use Numb. 7.

And it is now time that we come to the other parts of a Deed, and first to a Condition.

CHAP.

CHAP. VI.

Of a Condition.

Terms of
the law,
Co. super-
Lit. 201.

A Condition is a kinde of Law or bridle annexed to ones act, staying or suspending the same and making it uuncertain whether it shall take effect or no. Or as others define it, It is *modus* an Equality annexed by him that estate, interest, or right to the land &c. whereby an estate &c. may either be created, defeated or enlarged upon an incertain event. And this doth differ from a Limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue. And this sometimes is contained in a Testament or Will, and sometimes in a deed. And when it is in a deed it hath no proper place assigned it, but it may be in any part of the deed; howbeit for the most part it is placed next after the *Habendum*, or next after the Reservation of the rent. It is also sometimes annexed to and depending upon Estates; and sometimes annexed to and depending upon Recognizances, Statutes, Obligations, Contracts, and other things: Conditions are also contained in Acts of Parliament and Records. But of these we speak not here in the ensuing matters which are especially to be applied to such Conditions as are usually contained in deeds and annexed to the realty, *i.* to estates in fee simple, fee tail, for life or years

1. Condition.
Quid.

Limitation,
Quid.

27th. 8. 16.
Co. 2. 7.

Co. Super
Lit. 201.
plow.
Colthrifts
case.
Co. 8. 43.

And of these Conditions there are divers kinds: For some are in deed or Express. *i.* when the condition is expressed by the party in legal terms and by express words in writing or without writing knit to the estate, as if I enfeof a man of land rendring rent at a day on condition that if it be not paid it shall be lawful for me to re-enter. And some are in law or Implied. *i.* when the condition is *incise* created by the law without any words used by the party. The first sort of conditions also are some of them precedent or executed. *i.* when the condition must be fulfilled ere the estate can take effect, as where an agreement is between me and *I S.* that if he pay me 10 l. at Michaelmas he shall have such a ground of mine for 10 years; or I make a lease of land to *I S.* for 10 years, provided that if he pay me 10 l. at Michaelmas he shall have the land to him and his heirs; and in these cases by the performance of the condition the estate is acquired, And some of them are subsequent and Executory. *i.* when the estate is executed, but the continuance thereof dependeth upon the breach or per-

2. Quotuplex.

formance of the condition, as where a lease is made for years, on condition that the lessee shall pay 10 l. to the lessor at Michaelmas, or else his lease shall be void, and in this case by the performance of the condition the estate is held and kept. These conditions also are some of them in the affirmative. *i.* that do consist of doing, as providing that the lessee shall pay the rent, or pay 10 l. to the lessor &c. And some in the Negative. *i.* that consist of not doing, as provided that the lessee shall not alien, &c. And some of them are in the Affirmative which imply a Negative, as provided that if the rent be unpaid that the lessor shall re-enter which implieth a Negative, *viz.* not paid. Conditions also are some of them collateral. *i.* when the act to be done is a collateral act, as that the party shall pay 10 l. go to *Rome*, or the like. And some are inherent. *i.* such as are annexed to the rent reserved out of the land whereof the estate is made: And some of them also are Restrictive & contain a restraint, as that the lessee shall not alien, or do waste, or the like. And some are Compulsory, as that the lessee shall pay to the lessor 10 l. such a day or his lease shall be void. And some of them be single. *i.* to do one thing onely, And some copulative. *i.* to do divers things. And some disjunctive. *i.* when one thing of divers is required to be done. And some conditions make the estate whereunto they are annexed voidable onely by entry or claim. And some of them make the estate void *ipso facto* without entry or claim. And sometimes they tend to destroy estates, sometimes to make, or to enlarge estates, and sometimes neither to make nor destroy, but onely to clog estates, as where a lease is made rendring rent on a day, on condition if it be not paid that the lessor shall enter on the land and keep it till the rent be paid. And all these ways conditions may be lawfully made.

In esse potest donationi modus, conditio sive Causa.

Co. Super
Lit. 208.

Lit. Sect.
327.

The conditions in law or implied are either by Common law, or by Statute law. The first sort are some of them founded on skill, as where an office is granted, there is a condition tacite implied, that if the grantee doth not execute it faithfully according to the trust, the grantor may put him out. And some are without skill, as where an estate is made for life or years of land, there is this condition implied, that if the lessee do waste he shall forfeit the place wasted, or if the lessee make a feoffment of the land he shall forfeit his estate and the lessor shall enter. And where an estate is made in fee of land, this condition is implied, that the feoffee shall not alien it in Mortmain. And these conditions do sometimes give a recovery, and no entry, as in the case of waste. And sometimes they give an entry and no recovery, as in the case of Alienation in Mortmain. In the case of exchange also there is a condition in law, for which see *Exchange*.

Co. 8. 44. 3.
65. Lit.
325. 378.
F. N. B.
205.

Co. 4. 123.

It is a general rule, That when a man hath a thing he may con-
 dition with it as he will. Conditions in deed therefore may be an-
 nexed to things inheritable, to frank tenements, or to chattels
 real and personal: as for example. If a feoffment in fee, gift in
 tail, or lease for life be made of lands or tenements, or a grant be
 of a rent, Common, or the like thing in fee simple, fee tail, or for life,
 these things may be done upon condition. So a lease for years of
 land, or a grant of a rent &c. for years may be made upon condi-
 tion. And a lease may be made for five years on condition that
 if the lessee pay to the lessor within the first two years 10 Marks
 that then he shall have the fee, otherwise but for five years. Also
 a Guardian in Chivalry may grant the wardship of the body and
 land or either of them on condition. A tenant by Statute Merchant,
 Staple, or Elegit may grant their estates upon condition. The
 Lord may grant his Seigniorship to his tenant on condition. The
 tenant for life may grant his estate to his lessor, or to him in reversion
 upon condition. The King may make letters Patents of deniza-
 tion to an alien, or a Charter of Pardon to a man for his life upon
 condition. Also releases and confirmations may be made upon
 condition. And a submission to an award may be upon a condi-
 tion. But an Institution to a Benefice, or an induction may not be
 on a condition. An Attornment, or an express Manumission of
 a villain cannot be upon a condition subsequent, as it may be upon
 a condition precedent. And a condition cannot be released upon
 a condition as some hold. But the contrary is held by others clear-
 ly, and that there is no difference between this and a release of
 a right; *Idem querens*. An award cannot be made on a condition as
 was held in *Sherer's case* 35 *Eliz.* A contract or sale of a Chattel
 personal, as an Ox or the like, may be upon condition, as if *A* sel
 his horse to *B*, that if *A* do such an act, then that *B* shall pay 5 l.
 at the day agreed upon, otherwise but 4 l. So if I agree with a
 Physitian that if he cure such a disease he shall have so much; and
 in this case he cannot have the money until he have done the cure.
 As where I promise a man 10 l. when he hath built such a house,
 in this case he cannot have the money until the house be built. Al-
 so retaining of servants, delivery of Charters and divers other
 things may be done upon condition. And if an Executor assent
 to a legacy upon a condition, the assent is good but the condition
 is void.

And conditions annexed to estates in all the cases before,
 howsoever they are most frequently and safely made by deed in
 writing, yet it seems such conditions may be made and annexed to
 any estate of a thing grantable without deed without any writing
 at all; howsoever in some cases it cannot be well pleaded nor used
 without a deed, for it is a rule, That if a condition be pleaded

3. What things may be made and done upon Condition. And to what things a Condition may be annexed, or not. And how it may be made and annexed thereunto.

if extended

Pe k. Sect.
 281.
 Co. super
 Lit. 274.
 Perk. Sect.
 724.
 Co. 8. 98.
 Dier 243

Co. 2. 74.

Co. super
 Lit. 274.

Perk. Sect.
 712. 713.

Co. 4. 28.

Lit. Sect.
 365.
 Co. super
 Lit. 162.
 216.
 Doct. and
 Stud. 16.
 Perk. Sect.
 715.

in any action to defeat a freehold, the deed wherein the condition is contained must be shewed. But if chattels reall, as leases for years and the like, or grants of chattels personall, a man may plead that such leases and grants were made upon condition, without shewing the deed. And in the first case also of a condition to avoid a freehold, it may be given in evidence to a Jury, and they may finde the matter at large as it is, and so the party may have advantage of the condition without shewing any deed of it. Also the pleading of a feoffment in fee on condition without deed and reentry, is good if the party confess the condition. A condition may be annexed to a limitation of uses, and thereby the same may be made void. See *Use*.

Co. 5. 40.

Co. 8. 90.

4. The nature of a condition in deed, and of a limitation

The nature of an express condition annexed to an estate in general is this: That it cannot be made by, nor reserved to a stranger, but it must be made by, and reserved to him that doth make the estate. And it cannot be granted over to another except it be to and with the land or thing unto which it is annexed and incident. And so it is not grantable in all cases; for the Estates of both the parties are so suspended by the condition, that neither of them alone can well make any estate, or charge of or upon the land; for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth alwaies attend and waite upon the estate or thing whereunto it is annexed: so that although the same do pass through the hands of an hundred men, yet is it subject to the condition still: And albeit some of them be persons priviledged in divers cases, as the King, infants, and women covert, yet they also are bound by the condition. And a man that comes to the thing by wrong, as a disseisor of land wheteof there is an estate upon condition in being, shall hold the same subject to the condition also. And when the condition is broken or performed &c. the whole estate shall be defeated: So that if there be a lease for life made by deed and not by will, the remainder over in fee, on condition that the lessee for life shall pay ten pound to the lessor; if the lessee pay not this ten pound, the estate in remainder is avoided also. *Et sic e converso*, unless by special limitation it be otherwise provided, as if *A* grant by Indenture land to *B* for life, the remainder to *C* in fee, rendring rent to *A* and his heires, with condition that if the rent be behind, to reenter and retain the land during the life of *B* and no more, and *A* doth enter in the life time of *B* for non payment; this doth not destroy the remainder. And if tenant for life and he in remainder joyn in a feoffment on condition that if &c. that then the tenant for life shall reenter; this

Co. surer
Lit. 186.
Perk. Sect.
818. Lit.
Sect. 358.
Dier 6.

Dier 299,
Co. 8. 44.
Perk. Sect.
818, 819.

Dier 817.
C. 10. in
Mary Port-
tingious
case super
Lit. 130.
Lit. Sect.
374. Per
Sect. 564.
10. 324.
Dier 127
Co. super
Lit. 224.

is good without defeating the entire estate : for regularly a condition cannot avoid a part of an estate onely, and leave another part entire ; neither can the estate be void as to one person, and good as to another (except it be in case of a condition annexed to an estate limited by way of use, as in *Frances* case, *Co.* 8. 90.) And yet if *A* make a gift in tail to *B*, the remainder to *B* in fee upon condition not to alien, and *B* doth alien ; this doth defeat the estate tail onely, and not the remainder. Also the whole estate of the whole and not of some part onely shall be avoided, except by agreement the condition be specially restrained to some part, and the re-entry given in that part onely, as where a feoffment is made of two acres on condition that if such a thing happen the feoffor shall enter into one of them. And further when he that hath right doth re-enter by force of such condition he shall avoid all charges and incumbrances put upon the land after the condition made, for he that doth enter into lands by force of such a condition, must have it again in the same plight as it was when he parted with it. And finally, a condition for the most part will not determine the estate without entry or claim. So that howsoever a Limitation hath much affinity and agreement with a Condition, and therefore it is sometimes called a condition in law, both of them do determine an estate in being before, and a limitation cannot make an estate to be void as to one person, and good as to another, as if a gift be made in tail to one and his heirs males, until he do such a thing, and then his estate to cease and go to another : yet herein they differ : 1. A stranger may take advantage of an estate determined by limitation and so he cannot upon a condition, 2. A limitation doth alwaies determine the estate without entry or claim, and so doth not a condition.

Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know therefore that for the most part conditions have conditional words in their frontispice, and do begin therewith. and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy without any addition of other words of re-entry in the conclusion of the condition that do make the estate conditional, as *Proviso*, *Ita quod*, and *Sub conditione*. And therefore if *A* grant land to *B*, To have and to hold to him and his heirs, Provided that, or so as, or under this condition, That *B* do pay to *A* ten pound at Easter next ; this is a good condition, and the estate is conditional without any more words. But there are other words, as *Si se contingat*, and the like, that will make an estate conditional also, but then they must have other words joyned

5. When an estate shall be conditional. And what words will make a condition. And what not. And how a condition may be known from a covenant or limitation. *Proviso. Ita quod. Sub conditione. Si, Si contingat.*

Co. 4. 121.
Dier 127.

Perk. Sect.
140.

See *infra*.

Lit. Sect.
380.
Co. 9. 128.
8. 176. 41.
Flow. 413.

Co. 10. 40.
Dier 300.
Lit. Sect.
93.

Co. 2. Lord
Cromwells
case. 10.
Mary Por-
tingtons
case. *Co.*
super Lit.
204.
27 H. 8.
16. *Lit. Sect.*
328, 329.
230, 331.

ed with them, and added to them in the close of the condition, as that then the grantor shall reenter, or that then the estate shall be void, or the like. And therefore if *A* grant lands to *B*. To have and to hold to him and his heirs, and if, or but if it happen the said *B* doe not pay to *A* ten pound at Easter, without more words, this is no good condition, but if these or such like words be added, that then it shall be lawfull for *A* to reenter, then it will be a good condition.

But here note that these words *Proviso*, *Ita quod*, and *sub conditione*, albeit they be the most proper words to make conditions, yet do they not alwaies make the estate by the deed to be conditionall, but sometimes do serve for other purposes; for the word *Proviso* hath divers operations besides; for sometimes it doth serve for, and work a qualification or limitation, and sometimes it doth serve to make and work a covenant only. And then only (being inserted amongst the covenants of the deed) it doth make the estate conditional when there are these things in the case. 1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of it self. 2. When it is compulsory to the feoffee, donee, &c. 3. When it comes on the part, and by the words of the feoffor, donor, lessor, &c. 4. When it is applied to the estate, and not to some other matter, as if one grant a Manor with an Advowson appendant, and after the *Habendum* and reservation of rent amongst the covenants, there is this clause inserted [Provided that the grantee shall regrant the Advowson for the life of the grantor] this is a good condition. And thus it may be also a condition and a covenant, as if the words run thus, Provided alwaies, and the feoffee &c. doth covenant &c. that neither he nor his heirs shall doe such an act, this is both a condition and a covenant. But if the clause have dependence on another clause of the deed, or be the words of the feoffee, &c. to compell the feoffor to do something, then it is not a condition but a covenant only, as if there be in the deed a covenant that the lessee shall skowre the ditches, and then these words follow [Provided that the lessor shall cary away the earth.] Or there is a covenant that the lessee shall repaire the houses, and then these words follow [Provided that the lessor do provide timber.] So if this clause be applied to some other thing, and not to the thing granted, then it is no condition, as if a lease of land be made rendring rent at *B*, provided that if such a thing happen, it shall be paid at *C*; this doth not make the estate conditional. Or a lease is made for years without impeachment of waste, *proviso quod non prosterneat domus voluntarie*, in this case howsoever this doth make the priviledge, yet doth it not make the estate conditional. Or a lease is made for years rendring rent, provided

Co super
Lit. 146.
Co. 2. 70.
Dier 151.
311. Lit.
Bro. 256.
Dier 6.
213.
Plow 136.
5 H. 7. 7.
Perk 12th.
732.

Covenant.

vided that the lessor shall not distrain for the rent; in this case this is a good condition, but not annexed to the estate. So if in a deed of bargain and sale of land after the *Habendum*, there are these words, *viz.* upon these conditions following, *viz.* that if the vendor pay the vendee twenty pound at Easter, and enfeof him of a meadow called S before Whitfontide, that the bargain shall be void. Provided nevertheless that the bargainer shall hold the land for twenty years without the let of the bargainee; it seems this Provided in this case doth not make a condition. So if a lease be made of a house, and amongst the covenants these words are inserted [Provided also that if the lessor will dwell upon it, or keep it in his hands, then the lessee, his executors and assigns doth covenant upon one years warning to remove and give place to the lessor this lease notwithstanding;] it seems this is no condition but a covenant only. If a lease be made, provided that if the rent be behinde, without any more words; this is no good condition.

Dier 318.

27 H. 8. 15.
Bro. Con-
dition 7.Curia pas-
che 14 Jac.
Br. in the
case of
Muddy
Co. super
Lit.Co. super
Lit 236.
237. D. Ct.
and Stud.
122. Dier
138. Plow.
142.
7 H. 4. 22.
Co. super
Lit. 204.
Co. 10. 42.
Dier 318.
Doct. and
Stu. 34.Doct. and
Stu. 94.
Dier 6. 91.
63. 92.

The word *si* also doth not alwaies make a condition, for sometimes it makes a limitation, as when a lease is made for years if I S shall live so long

There are other words also that in the Kings grant, in last Wills and Testaments, and other special cases do make conditions, as *ea intentione*, *ad effectum propositum*, *intentionum*, paying, and the like. So that if one devise his land to I S, *ea intentione &c.* that he shall pay to W S ten pound, or paying, or so as he pay to W S ten pound, or to sell &c. these are good conditions. But these words regularly do not make a condition when they are used in deeds. And therefore if one make a feoffment in fee *ea intentione*, *ad effectum &c.* that the feoffee shall do, or not do such an act; these words do not make the estate conditional, but it is absolute notwithstanding. And yet perhaps these words being conjoyned with some others may make a condition, as if lands be granted *ea intentione quod si defeceris &c. tunc quod retribabis*, or the like.

Also conditions are sometimes made especially in estates and leases for years, without any of these formal words when the apparent intent of the lessor is to make the estate conditional, albeit the words be not used as the words of the lessor, but as the words of the lessee, or indefinitely of neither. And therefore it hath been said, That if an Indenture be made between A and B thus: It is agreed and covenanted between the parties aforesaid. that B shall have the land for years, and that he shall not alien it; that this estate is conditional: But it seems this is not law. But if this clause be inserted amongst other covenants, *viz.* If the lessee hinder the lessor to sell, cut and carry away the trees upon the lands devised, that the lessor may re-enter and the lease shall be void; this is a good condition, and so it hath been adjudged in the case of

Haward.

Howard and Fulcher, Hil 3 Ca. B. R. And if a lessee for years do covenant in his lease, That if he, his executors or assigns shall alien, that it shall be lawful for the lessor to re-enter; it seems this is a good condition, and not a covenant onely. And if a lease for years be made, and this clause is inserted in the deed. It is agreed between the parties that if the lessee do not pay 10 pound to the lessor at Easter, that from thenceforth the lease should be void; this is a good condition. And if a lease be made with this clause inserted in the deed, It is agreed that whosoever shall have the estate or interest, that he or they shall finde sureties within the year for the rent, otherwise the estate shall cease; it seems this is a good condition. And if a lease for years be made with this clause inserted, And that it shall not be lawfull for the lessee to alien without license of the lessor, under pain of forfeiture; this is a good condition. And if a lease for years be made of a house, with this clause inserted in the deed, and a lessee shall continually dwell upon the same house upon pain of forfeiture of the said term; this is a good condition. And if in a lease for years the lessee covenant to pay so much rent, and then these words are inserted, And if it shall happen the said yearly rent &c. then the lessee doth covenant and grant, &c. that the lease shall be void; it seems this is a good condition, and so hath it been ever taken as was said by *Just. Dondridge. Hil. 3 Car.* And in all these cases the estate is conditional. But in cases of feoffments in fee, gifts in tail, and leases for life, it seems words penned in this manner will not make conditions, but that in these cases the precise and formal words of a condition are requisite. And therefore that if a feoffment be made by deed, and therein is inserted this clause, That it is agreed, or that the feoffee doth covenant that if the feoffor do such an act, that the feoffor shall re-enter; this is no condition nor the estate here by made conditional. And yet see *Perk. Sect. 744.*

* If one make a lease for years on condition to pay rent at so r feasts, and after there is a clause in the deed. And if the rent shall be behinde, &c. that he shall distrain; this clause doth not take away the condition but the same doth continue and the estate is conditional still. See more in the next question.

In the making of estates the cause is regarded. And in case of the grant of lands or tenements, *causa* doth sometimes make a condition, As if a woman give lands to a man and his heirs, *causa matrimonii pralocuti*; in this case if she either marry the man, or the man refuse to marry her, she shall have the land again to her and her heirs. But of the other side, if a man give land to a woman and to her heirs *causa matrimonii pralocuti*, though he marry her, or the woman refuse, he shall not have the lands again to him and his heirs. And in the case of a grant executory, the word [*pro*] may make a

Dier 66. 63
Curia Mic.
37. 38. Ellis
B. R.

Dier 73. 27
Co. Super
Lit. 204.
Lit. 204.

Plow. 131.
Co. Super
Lit. 204.
D. & S.
91. Dier
65. 138.

Dier 313

Co. Super
Lit. 204.

con

Co. super
Lit. 204.
Co. 10. 43.
Pl. w. 141.
9 Ed. 4. 19.
45 Ed. 4. 2.
Dier. 6.

condition. And therefore if a man grant me an Annuity *pro una aera terre*, or *pro decimis* &c. or if he grant me an Annuity for a way, or a gutter through my ground, this is conditionall, and if he be disturbed in the way, acre of land, tithes, or gutter, he may refuse to pay the Annuity. So if an Annuity be granted to an Officer for the executing of his office, or *pro consilio impendendo*, if the grantee do not execute the office, or give counsell, &c. the Annuity shall cease. But if one grant me Tithes or an Annuity, and I grant an Annuity for these Tithes, or grant to give counsell for the Annuity, it seems the grants that are in this manner are not conditionall, but absolute. So if I *pro consilio* &c. or *pro una aera terre* &c. make a feoffment in fee, or lease for life of another acre, these estates are not conditionall. And if one devise land to be sold by his executors, and to be distributed for his soul, by this it seems the estate or power of the executors is conditionall. So if one devise his land to finde a Preacher or a Chaplain. But otherwise it seems it is of land so conveyed by deed in a mans life time. And if a feoffment be made of land *ad erudiendum filium*; some have said this estate is conditionall.

Dier 7.
127. See
Testament.

P. ow. 141
142.

Co. super
Lit. 231.
235. Co.
10. 42
P. ow. 214
Lit. Sect.
90. Dier.
390.

The most apt and proper words to make a limitation of an estate are *Quandiu*, *Dummodo*, *Dum*, *Quosque*, *Si*, and such like. And therefore if A grant lands to B, To have and to hold to him and his heirs, untill B goe to Rome, or untill he be promoted to a Benefice, or untill B pay to A, or A pay to B twenty pound, or so long as I S shall live, or if A grant lands to B, to have and to hold to him, his executors, &c. if I S and I B shall live so long. Or if A grant lands to B, To have and to hold to him for the life of B, So that B pay 20 pound to A at Easter following; these are not conditionall, but limited to estates. So if A grant lands to B To have and to hold to him for so long as he shall keep him self a widower; or *dum sola fuit*, or *durante viduitate*, if the grantee be a widow; these are good limited estates, but these words do not make the estates to be conditionall,

Testament.

Limitation.

Dier 125.
P. ow. 159.
Perk. Sect.
740.

If the words in the close or conclusion of a condition be thus, That the land shall return to the feoffor, &c. or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffor shall *recipere* the land; these are either of them good words in a condition to give a reentry, as good as the word [reentry] and by these words the estate will be made conditionall.

Co. super
Lit. 221.
234. Co. B.
44.

The tenant by the curtesie, the tenant in taile after the possibility of issue extinct, the tenant in dower, the tenant for life; the tenant for years, by Statute or Elegit, Gardian, &c. doe hold their estates subject to a condition in law, so that if either of them alien his land in fee, or claim a greater estate in a court of record then his own, he doth forfeit his estate, and he in remainder or reversion

6. What shall be said a condition in law. And when an estate shall be subject to such a condition.

on may enter, and if such a tenant do waite, he in reversion shall recover the place waisted. The tenant in fee simple doth hold his estate subject to a condition in law, so that if he alien his land in Mortmain he doth forfeit it, and the Lord may enter upon him. So also he that doth take land in exchange doth hold it under a condition in law, *viz.* that if the land be given in exchange for that land be recovered from him that hath it, that he shall enter upon his own land again. Also every officer that hath to do in the administration of Justice, all Keepers of Parks, Stewards, Beadles, Bailiffs, and such like, hold their offices under a condition in law, so that if they do not duly execute it, and do all that doth thereunto appertain, they may forfeit them, and the grantor may put them out. *In quo quis delinquit in eo est de jure puniendus.*

7. What shall be said a good Condition in Deed or limitation in his original creation. And what not.

1. For the manner, and frame, and order of making of it.

To every good condition is required an external form, *i.* words to declare an intent in the party to have the estate conditional, as in the cases before. And an internal form, *i.* such matter as whereof a condition may be made.

As to things executed, the condition must be made and annexed to the estate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another Deed, and not the same Deed wherein the estate is made, if it be delivered at the same time it is as good as if it were contained in the same Deed. And therefore if a man make a feoffment, Lease, or the like, by one Deed absolute, and at the same time make another Deed of defeasance or condition, and deliver both together, this is a good condition, and will make the estate conditional. But if the defeasance be sealed and delivered before, or after the Deed *contra*. And therefore if one make an absolute feoffment in fee, and before or after the sealing or delivery of that Deed the Feoffor declared himself by Deed: or the Feoffor and Feoffee agree by Deed that the estate made before, or to be made after, shall be conditional, yet this is not conditional. And yet if an Annuity be granted absolutely by one Deed, and after the Grantee grant to the Grantor, that if the Grantor do such a thing, the Annuity shall cease: in this case the Annuity is conditional.

Perk. Sed.
717. Co. 1.
113. Plow.
113. Co.
super Lit.
146, 117.
Co 27.

A Condition may be annexed to an estate by way of use, as if a feoffment be made to *A*, to the use of *B*, and his heirs, on condition that *B* shall pay to the Feoffor twenty pound such a day; this is a good Condition. So if one covenant to stand seised of lands to the use of *B* and his heirs, on condition that if he pay him ten pound, the use shall be void, or the like. Also a condition may be annexed to an estate created by Will, as if one devise land to *IS* for his life, Provided that he pay ten pound yearly to *ID*, this is a good condition. Whereof see in *Testament*.

C. 146. Hil.
40 Ja. B. R.
Warners
case. Co. 1.
113. Alber
nies case.
Dier 126
318.

A rent, or any such thing may be granted on condition, that if

Co. 8. 17.
24 E. 3. 19.

if such a thing be or be not done, the rent shall cease for a time, and then revive again, and this condition is good. But in case of land it is otherwise: for that cannot be granted after this manner. Also a condition to make an estate void for a part of the time is not good. And therefore if a feoffment be on condition, that upon such a contingent the feoffor shall enter and have the land for a time, or the estate shall be void for part of the time; or make a lease for ten years, provided that upon such a contingent it shall be void for five years; these conditions are not good. And yet if a feoffment be made of two acres, provided that upon such a contingent the estate shall be void as to an acre onely, this is a good condition.

Co. 1. 86.
Perk. Sec.
718. Co. 4.
221. Dier. 6

Co. super
Lit. 244.
Doct. &
stud. 94.
159. 100.
Co. super
Lit. 379.
Co. 1. 84.
Dier. 33.
211. 7. 18.
Dier 4. Co.
8. 95.

A condition that a stranger, or the heir of the feoffor shall do an act is good, as if a feoffment be made to *I S* on condition that *I D* shall pay to the feoffor ten pound at Easter next; or if a feoffment be made on condition that if the heir of the feoffor pay twenty shillings to the feoffee, that the feoffor and his heirs shall re-enter. But a condition to give a stranger a re-entry is void so far forth. And therefore if an estate be made upon condition, that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; howsoever this may be so drawn, as it may be a good condition to give him his heirs, &c. that doth make the estate an entry, yet it cannot be good to give the estate or the entry to the stranger. So if a feoffment be made on condition that upon such a contingent the feoffor and a stranger shall enter; this is not good to give an entry to the stranger, but it is good to give the feoffor a re-entry. And yet by Will a man may devise a term after this manner.

Co. super
Lit. 213.

If a man enfeoff another, upon condition that he and his heirs shall render to a stranger and his heirs a yearly rent of twenty shillings, &c. and if he fail of payment thereof, that the feoffor shall re-enter; albeit this as a reservation of rent is meerly void, and the condition that doth call it a rent, is meerly mistaken, yet the condition is good, and *ut res valeat* the words shall be taken contrary to their proper sense.

Perk. Sec.
793.

If *I* enfeoff *I S* of land on condition that if *I D* give to him ten pound, or go to Rome before such a day, &c. that then the feoffee shall pay to me ten pound &c. this is a good condition.

Co. super
Lit. 207.

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pound, he shall have the fee of land; this is not a good condition. But if he say further, And if he fail to pay that, the feoffor shall re-enter; this is good.

Co. super
Lit. 221.

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter; this is a void condition, for when the issues fail the estate is at an end.

Conditions that are so penned, as they are insensible and altogether uncertain, are void: as if one make a lease on condition that if the rent be behinde to restrain, and if there be not sufficient, the ground to enter into the premises; this condition is void for insensibility, and the estate is absolute. *Et sic de similibus.*

To enlarge an estate.

A condition to enlarge or encrease an estate may be good, as if a gift be made in tail, or a lease be made for life or years, on condition that if such an act be done or not done, the lessee shall have the land to him and his heirs, as if one make a lease for life to one, and if the lessor die without heir of his body, then he doth grant the land to the lessee and his heirs for ever. Or if land be granted to a man for 3 years, on condition that if the grantee pay to the grantor within the two first years ten pound, then that he shall have the fee simple, otherwise that he shall have the land but for five years, and livery of seisin be made according to the deed this is a good condition, and by this upon the performance of the condition the fee simple will pass. So if one grant land for five years rendering rent, and that if the lessee will hold it over to him and his heirs, that he shall pay twenty pound rent; this is a good condition, and if he pay the rent, he shall have the fee simple. So if a man make a lease for years, and at the same time for the surety of the term to the lessee makes a feoffment to him upon condition that if he be disturbed in his term, he shall have the fee simple of the land, and deliver both these deeds at one time, and give livery of seisin accordingly; this is a good condition. So if a lease for life be made upon condition That if the lessor or his heirs pay to B or his heirs ten pound at a certain day, that then the lessor may re-enter, and if he do not pay it at that time, and the lessee pay to the lessor or his heirs ten pound at a certain day, after the former day, that then the lessee shall have the land to him and his heirs for ever; this is a good condition. But in all cases where these kind of conditions are good to make the encreased estate good, there must be these things in the case: 1. There must be a precedent particular estate as an estate in tail for life or years, for a foundation to erect the subsequent estate upon, and that first estate also must be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privity must remain untill the time of the performance of the condition, for if the donee or lessee do grant away the first estate, the condition cannot afterwards be performed to effect and produce the encreasing estate. 3. The subsequent estate must vest *eo instanti* when the contingency upon which the condition dependeth, shall happen or never. 4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time, for *quæ incontinenti sunt in esse valentur*. 4. The condition upon which the increase is, must be

Maddy & Gardners case. Ad. judge p. 1. ac. B. R. Co. 6. 41.

Co. 2. 75. Plow. 477. 482. Lit. Sect. 350. Perk. Sect. 710. Pl. v. 135. 10. All. pl. 15. Perk. Sect. 745. 707. Plow. 14. Lit. Sect. 707. 350. Plow. 272. 482. 483. 4 H. 7. 4. See more in the Lord Stafford's case Co. 3. 73.

be possible and lawfull, for upon an impossible condition it cannot, and upon an unlawfull condition it shall not increase

Co. 1. 155.
Dier 150.

If one make a lease for life, provided that if the lessee dye within sixty years, that his executors shall have the land for so many of the sixty years as shall be to come at the time of his death; this is no good condition to make the estate to encrease, but it may be

Co. 1. 24.

a Covenant. And if a lease for years be made, on condition that if the lessor sell the reversion of the same land, the lessee shall have the fee of it, this is no good condition to encrease the estate. And

Covenant.

Co. 8. 75.

a possibility cannot decrease upon a possibility, as a lease for years to a lease for life by one contingent, and the lease for life to a fee simple by another. And if a lease be made to a man and a woman for their lives, on condition that which of them two shall first marry that one shall have the fee and they intermarry; in this case neither of them shall have the fee for uncertainty.

Co. Super
Lit. 218.

Co. Super
Lit. 218.
30 Ed. 3.
27.

If a man make a lease for life, and adde this condition, That if the lessee within one year do not pay twenty shillings, that he shall have but a term of two years, and he do not pay the 20s by this his lease for life is gone, and he hath now but a lease for two years.

To abridge
an estate.

1 H. 8. 13.

If a lease be made, on condition that if a stranger dislike it or be discontented with it, that the lease shall be void, this is a good condition.

2. For the
matter and
substance of
it.

Hil. 6. Jac.
B.R. Cu-
ria.

If a lease be made, on condition that if the lessee be outlawed, the lease shall be void; it seems this is a good condition.

Trin. 3. E.
6. per
Curiam.

If a feoffment be made, on condition that if the feoffee commit treason that the feoffor shall re-enter; in this case the condition is vain; for if the feoffor enter, the entrie is not lawfull, for the King is intitled; and his title shall be preferred.

Prerogative.

Co. 1. 85.
6. 43. Co.
9. 128.

No condition or limitation, be it by act executed, limitation of a use, or by devise, or last Will, that doth contain in it matter repugnant, and tending to the utter subversion of the estate, or matter that is against law, or matter that is impossible to be done, is good. And therefore in all such cases if the condition be subsequent, the estate is absolute, and the condition void: And if the condition be to go before the estate, the estate and the condition both are void.

Testament.

Co. Super
Lit. 223

If a feoffment or other conveyance be made of land, or a grant of rent &c. in fee simple by deed or will, upon condition that the feoffee or grantee shall not alien to certain persons, as to I S, or to I S and W S; this is a good condition. So if one make a feoffment in fee of land, on condition that the feoffee shall not alien it in Mortmain; this is a good condition: So if A be seised in fee of black acre and B doth enfeof A of White acre in fee, on condition that he shall not alien black acre; this is a good condition. But if the condition be that the feoffee or grantee shall not alien the thing granted to any person whatsoever; or that if he do alien to any person, that he shall pay a fine to the feoffor; these conditions are void in

Repugnant
conditions.
To restrain
Alienation.

negative.

the case of a common person as repugnant to the state. But in case of the King, such conditions are good. And in the cases of a common person also the alienation is good until it be avoided by the feoffor. And in *Pafe. 197. B. R.* it was held by Just. *Dodridge* and *Chamberlain*, that if a feoffment be on condition that if the feoffee alien, he shall pay 10l. to the feoffor; that this is a good condition: but Ch. Just. & Just. *Haughton* held the contrary, for then this shall be a circumvention of the law. If a gift had been made to an Abbot & his successors, on condition not to alien, this had been a good condition.

Bagge & Tanners case.

Doff & St. 124.

If one make a feoffment of land to an infant, on condition he shall not alien to any person; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a feoffment to a husband and wife, on condition they shall not alien; this condition to some intent is good, i. to restrain alienation by feoffment of deed, and to some intent repugnant and void, i. to restrain alienation by fine for that is lawful. So if a gift be made in tail, on condition that the tenant in tail may alien for the profit of his issues; this is a good condition. And so if land be given in tail, upon condition that the tenant in tail or his heirs shall not alien in fee simple, fee tail, nor for the term of any others life, but for their own lives; this condition is good. But if lands be given in tail on condition that the tenant in tail, or his heirs in tail shall not suffer a common recovery, levy a fine with Proclamations according to the Statutes of 4 H. 7. and 22 H. 8. to bar the issues, or on condition that he shall not make copyhold estates of copyhold land, according to the customs of the place, or make leases according to the Statute of 32 H. 8. *ca. 18* these conditions are held to be repugnant, and for that cause void. And yet see, for the last of these cases the opinion in *Co. super Lit. 223.* to the contrary, and that a condition to restrain the making of such leases is good; for this power is not incident to the estate, but given to him collaterally by the Statute, and *Quilibet potest renunciare juri pro se in re ad alio.* But *totu curia* in *Mary P. v. Marguerite* case is against him. If a man make a gift in tail to A, the remainder to him and his heirs, on condition that he shall not alien; this condition as to the estate tail is good, and void as to the other. And therefore if a alienation be he shall defeat it onely as to the estate tail. And if a man make a gift in tail, on condition that the donee or his heirs shall not alien; this is a good condition to some intents; and void to other, and therefore if he make a feoffment in fee, or in any other estate by which the reversion is discontinued to himself, the donor shall enter; otherwise if he suffer a common recovery. And if a gift in tail, on condition that the tenant in tail shall not make a lease for his own life, is not a good condition, by *Co. 643.* against *Co. super Lit. 223.* if one feoff in fee of land; and make a lease of it for years or life, on condition that the lessee shall not alien the land leased, nor any part thereof during the term, or on

Co. super Lit. 224. 20 H. 7. 22. 12 H. 7. 23. Co. 10. 30. Perk. 260. 739 21 H. 6. 33.

Dier 48. Co. 6. 44.

Co. super Lit. idem Dier 227.

Co. 6. 43.

Co. 6. 49. 484. super Lit. 223.

con.

condition: that he shall not alien it, or any part of it, during the term without licence of the lessor; these are good conditions. So if one be seised in fee of a Manor, and he make a lease of years of it to J. S. on condition that he shall not make voluntary estates by copy; this is a good condition. But in a feoffment in fee such a condition is repugnant and void. And if one be possessed of a lease for years, or of a house, or of any other chattel real or personal, and he give or sell all his interest therein upon condition that the donee or vendee shall not alien the same; this condition is void for repugnancy, and the gift or sale is absolute.

Co. 2. 72.
Dier 318.
Dier 94.
If one make a feoffment of land in fee, on condition that the feoffor shall retain the land for twenty years without interruption; it seems this is a good condition and not repugnant.

If I grant land to another for life, if it shall please me so long to suffer him; it seems this condition is repugnant and void.

Co. 10. 39.
super Lit.
206. Plow.
77. 131.
21 H. 7. 8.
8 H. 7. 10.
Perk. feci.
931.
If a feoffment be made of land in fee, on condition that the feoffee shall not enjoy the land, or shall not take the profits of the land, or on condition that the heirs of the feoffee shall not inherit the land, or condition that the feoffee shall not do waste, or condition that his wife shall not be endowed; in all these and the like cases the condition is void as repugnant to the estate.

Co. 6. 41.
1. 34. super
Lit. 224.
If a gift in tail be made, on condition that the donee or his issues shall not take the profits of the land, or on condition that if the donee die, his estate shall go unto another, or on condition that their wives shall not be endowed, or on condition that they shall not do waste, or on condition that warranty and assent or a collateral warranty shall not bar the issues in tail; all these conditions are repugnant and void.

Co. 12. 3.
Perk. fol.
145.
If lands be given or granted to two and their heirs, on condition that the survivor shall have the whole notwithstanding partition; or on condition that the survivor shall not have the whole albeit there be no severance; these conditions are repugnant and void.

If one make a lease for life, on condition that the lessee shall not do fealty; this condition is not good.

Co. super
lit. 209.
If lands be given to one and the heirs males of his body provided that if he die without heirs females of his body, that the donor shall reenter; this condition is repugnant and void.

Co. super.
lit. 146.
10 H. 7. 8.
Co. 6. 47.
5 H. 7. 7.
7 H. 6. 24.
Perk. feci.
732.
If one have land in possession, or reversion, and he grant a rent out of it, on condition that the grant shall not charge the person of the grantor; this is a good condition, and not repugnant. But if a man grant a bare annuity, or grant a rent charge out of another man's land with such a condition, or if one grant a rent charge, on condition that the grantee shall not disfranchise, nor charge the person of the grantor, or if one grant a rent out of land, on condition that the land shall not be charged with it; all these conditions are repugnant and void. So if two grant a rent charge out of land, provided

that it shall not extend to one of them; this condition is repugnant and void.

If a man seised in fee of land make a lease for years rendring rent, and after the lessee makes a lease to the lessor of other land on condition that he shall not distrain for his rent in the former lease made to this lessee; this is a good condition, and not repugnant.

Perk. Sec.

If one make a feoffment in fee, or lease for life, with warranty, on condition that the feoffee or lessee shall not vouch to warrant, nor recover in value, or if the lease be made without impeachment of waste, on condition that if the lessee do waste the lessor shall reenter; these are good conditions, and not repugnant.

Perk. Sec.
734. Dier.
47.

Conditions against Law.

All conditions annexed to estates being compulsory, to compel a man to do any thing that is in its nature good, or indifferent, or being restrictive, to restrain or forbid the doing of any thing which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any Statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void. And therefore if lands be given or granted to a man, upon condition that he shall kill a man or upon condition that he shall burn his neighbors house, or upon condition that he shall forswear himself, or upon condition that he shall save and keep harmless the grantor whatsoever he shall do, or that if he do not these things, the grant shall be void; this condition is void. Or if lands be given or granted to an officer, upon condition that he shall not duly execute his office; this condition is against law, and void: *Et sic de similibus*.ⁱ So if a gift be made in tail, upon condition that the donee shall discontinue, or one give or grant land, on condition that the grantee shall be a foreteller against the Statutes; these and such like conditions are void. And hereupon it is, that conditions annexed to land, that the profits thereof shall be employed to superstitious uses are void. And hence also it is that such conditions as are against the liberty of law, as that a man shall not marry, or the like, are void. And hence also such as are against the publique good. And therefore it seems if one grant his land to IS on condition that he (being a husbandman) shall not sow his errable land, this condition is void. And in all these cases if the condition be subsequent to the estate, the condition only is void, and the estate good and absolute; if the condition be precedent the condition and estate both are void, for an estate can neither commence nor encrease upon an unlawfull condition.

Co. Super.
Lit. 223.
224. 207.
Perk. Sec.
722. 723.Perk. Sec.
727.Co. 1. 24:
6. 43.Dier 349.
Co. super
Lit. 206.Co. 11. 511
7 Ed. 3. 64.
Perk. Sec.
722. 723.* Co. 6. 43.
super Lit.
207. 219.
206.Dier 352.
262. Plow.
152. Perk.
Sec. 235.729. Plow.
272. 286.
Co. 1. 24.
super Lit.
207.

Conditions impossible.

* All conditions annexed to estates that contain in them matter at the time of making of them impossible to be done, are void. And therefore if one give or grant land on condition, that a man shall go to Rome in three days, or condition that a man shall enfeoff

a corporation, when there is none such, or if one give lands in tail, on condition that the estate shall cease, as if the tenant in tail be dead, or if one grant lands, on condition that a man shall infeoff his wife; all these and such like conditions are void. And in these cases also if the condition be subsequent, the condition is void only, and the estate is absolute; and if the condition be precedent, the condition and the estate both are void, for an estate can neither commence nor increase upon an impossible condition. And if the thing to be done by the condition be possible at the time of the making of the condition, and do afterwards by the act of God become impossible, the condition is become void, and the estate absolute; as if a feoffment be made, on condition that the feoffee shall before Easter following infeoff the feoffor, and the feoffee dye before the day, or on condition that the feoffee shall appear in such a Court before or at Easter, and he dye before the time, in these cases the condition is gone; and the estate is absolute.

And the same Law is for the most part of Limitations, if they be repugnant, impossible, or against Law, as is before shewed to be done of Conditions. See more in the next division following.

It is a general rule, That such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the Law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases. And therefore if a lease be made, on condition that if such a thing be not done, the lessor [without any words of heirs, executors &c.] shall re-enter and avoid it; in this case regularly the heir, executor &c. shall not take advantage of this condition. So if one make a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, that he shall depart; in this case if the lessor dye, his heir, executor, &c. shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without the license of the lessor; in this case the restraint shall continue only during the lives of the lessor and lessee and no longer. And yet this rule hath an exception, for if a man mortgage his land to W, upon condition that if the mortgagor and I S pay 20 s. such a day to the mortgagee, that then he shall re-enter, & the mortgagor dye before the day; in this case I S may pay the money and perform the condition. But otherwise it is whiles the mortgagor doth live, for in that time I S alone without him may not tender it, and if he do, this tender is no performance of the condition. And in case where a condition doth tend to create an estate, there it shall have the most favourable exposition that may be, and therefore in that case albeit the words be not satisfied, yet

Limitation.

8. How a condition in deed or a limitation shall be taken and expounded. And how it must and ought to be performed.

1. In respect of persons.

Not to alien.

To pay money.

Co. 6. 41.
1. 84.

Co. 890.
Super Lit.
219. 27. H.
8. 14.

Dier 66.

Co. Super
Lit. 219.

Lit. Sect.
353. Co.
Super Lit.
219. Co. 8.
60.

To make an estate.

if the intent be satisfied, it sufficeth. And therefore if one make a feoffment in fee, on condition that the feoffee shall make an estate back again in tail to the feoffor and his wife before such a day, and before that day the feoffor dye, in this case the condition shall be performed as near to the intent as may be: and therefore if the condition be, That he shall make the estate to them two *Habendum* to them and the heirs of their two bodies engendred, the remainder to the right heirs of the feoffor, the estate shall be made to the wife for life without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife. And if *A* enfeoff *B* on condition that *B* shall make an estate in frankmarriage to *C* with such a one the daughter of the feoffor; in this case albeit an estate in frankmarriage may not be made, yet an estate shall be made to them for their lives. *Et sic de similibus. Condicio beneficialis qua statim destruit benigne secundum verborum intentionem est interpretanda, odiosa autem qua statim destruit stricte secundum verborum proprietatem est accipienda.*

2. In respect of time.

In all cases where a time is set for the doing, or performance of the matter contained in the condition, be it to pay money, make an estate, or the like, it must be done at the time agreed upon, and set down in the condition. And in cases where it is to be done before a time certain, it must be done before that time, or else the condition is broken. But in all cases where no time is set for the doing of the thing contained in the condition, be it to pay money, make an estate, or the like, if the act to be done, be to be done to the party that doth make the estate, or be to be done to him and a stranger, and be such a thing as is for the benefit of him that doth make the estate, and for his benefit onely, there regularly the party that is to do the thing shall have time to do it during his life, unless the party, feoffor, &c. that doth make the first estate, whereunto the condition is annexed, doth hasten the doing thereof by request: for if he request the doing thereof and set no time, it must be done within a convenient time after that request; and if he request and prefix a time convenient when he doth desire to have it done, it must be done at that time; and in these cases the condition cannot be broken without a request, so long as he to whom the estate upon condition is made be living. And therefore in this case it is not like to a condition made by a Will, for if one devise his land to *I S* so as he pay the twenty pound to *I D* the Testator doth owe him, and no time is set for the payment thereof; in this case he must pay it as soon as it is demanded, or he doth forfeit the land, and the heir may enter. But if the thing to be done, be to be done to a stranger, and be for the profit and benefit of a stranger onely: as if a feoffment be made on condition that the feoffee shall marry the daughter of the feoffor, or on condition that the feoffee shall

To pay money.
Testament.

No marry *I S*.

Co. super
Lit. 209.
208. 219.
Co. 2. 79.
6. 31. Lit.
353. Plow.
30. Perk.
Sec. 155.
772. 794.
787. 793.
789. 788.
382. 311.
Dier 311.

shall infeoff a stranger, and no time is set for the doing hereof; in these cases the feoffee shall not have time during his life to do it, but he must do it in a reasonable time, and that without any request at all, or else he doth break the condition. And in some special cases when the act to be done is to be done to the party himself, the party shall not have time to do it during his life, as if one grant land to *I. S.*, on condition that he shall grant an Advowson to the grantor for his life, or on condition that he shall grant a rent charge to the grantor during his life, to be paid at Michaelmas and our Lady day; in these cases the grant of the Advowson must be before the Advowson fall, and the grant of the rent must be before either of the days of payment come, and that without request, else the condition is broken. And if the condition be that if *I. S.* do such an act, that then the feoffee shall pay ten pound to the feoffor, else that the feoffor shall re-enter, and no time is set when the feoffee must pay this ten pound; in this case, it seems the payment must be as soon as the same act is done, and that without any request at all. And in case where the feoffee &c. or a stranger be to do an act, and be alone is to do it, and it doth nothing concern the feoffor &c. as to go to *Rome*, or the like, there the feoffor &c. or stranger shall have time during his life to do the thing, and it cannot be hastened by request.

To infeoff

To grant an Advowson of rent.

To pay money.

Perk. Sect.
9. 793.

Co. Super
Lit. 209.

Co. Super
Lit. 220.
222.

If lands be granted, on condition that the grantee shall make a lease for life of other land to the grantor, the remainder to a stranger; in this case the feoffee shall have all the time of his life to do it, if he be not hastened by request. But if the condition be to make a gift in tail to a stranger, the remainder to the feoffor; in this case it must be done in time convenient without request.

To make a Lease.

If the King licence his tenant to infeoff *A* and *B*, so as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly; in this case it must be re-conveyed before the death of the feoffor, or else the condition is broken.

If *A* infeoff *B* of black acre, on condition that if *C* infeoff *B* of white acre, *A* shall re-enter; in this case *C* shall have time to do this during his life, if *B* do not hasten it by request.

To infeoff.

If a lessee grant his estate to a stranger, on condition that the grantee do get the good will of the lessor, and no time is set when he shall get his good will; it seems in this case he shall have time to get his good will during the term, and that although he deny it at the first, yet if he grant it afterwards that this is sufficient.

To get the good will of *I. S.*

When a time is set in certain for the payment of money, or the doing of any other thing generally, neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certain, but no hour of the day is set down wherein the

same

Co. Super
Lit. 209.

Perk. Sect.
795.

Lit. Sect.
248.
Co. Super
Lit. 213.

same shall be done, in this case they must attend such a distance of time before the Sun set, as may be convenient to do that work in.

To pay money. And if the condition be to pay money at a place certain, at any time during life, in this case the money may not be tendered at any time in the place, in the absence of him that should receive it, but he that is to pay it must give notice to the other party before hand what time he will tender it, that the other may be ready to receive it. Or if at any time the parties hap to meet at the place, a payment or tender then at that place is sufficient. And the same law is for the most part in conditions of obligations.

3. In respect of place.

In cases where a place is set down for the doing of a thing contained in the condition, there it must always be done at that place, unless by some agreement made between the parties afterwards another place be appointed, otherwise the condition is not performed, and the parties are not bound to attend in any other place. But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service, as to pay money, or any such like thing, the party that is to do it, must at his peril seek out the person to whom it is to be done, if he be *infra regnum Anglia*: but if he be not within the Kingdom, he is not bound to seek him, and yet the condition is not broken. And if the thing to be done be either local, i. such a thing as must be done in or at a place certain, as the making of

Co. Super.
Lit. 210,
211, 212,
Lit. sect.
343-345.
Bro. Con-
dition 60.

To pay money

a feoffment of land, payment of rent, or the like; in this case the thing must be done at that very place, and a tender of doing it in that place is a sufficient performance of the condition; as for examples: If a feoffment be made, on condition that the feoffee shall pay to the feoffor twenty pound on Easter day at Dale, and the feoffor tender the twenty pound the same day at Sale, and albeit the feoffor be at Sale, and he tender the twenty pound to his person there the same day, yet this is no performance of the condition. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is set for the payment thereof; in this case the mortgagor must seek the mortgagee and tender it to his person at his peril: and tender of the money upon the land mortgaged, is not a sufficient performance of the condition. And if a feoffment be made, on condition that the feoffee shall infeof the feoffor of white acre in Dale, in this case the feoffment, or the tender of it must be in Dale, and cannot be elsewhere, and a tender of it there is sufficient to perform the condition. So if the condition be, that the feoffee shall in Easter Term next acknowledge satisfaction upon a judgement in the Kings Bench; this must be done there and cannot be done elsewhere. So if a feoffment in fee be made of white acre, rendering rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and

To infeof.

**To acknow-
ledge satis-
faction.**

condition that if the rent be not paid, the feoffment to be void, and

no

no place is set for the payment of it, in this case the feoffee is not bound to tender his rent any where for the saving of the condition, but upon the land, and a tender there is sufficient. And if a man make a feoffment in fee, without any reservation of rent precedent in the deed, on condition that the feoffee and his heirs shall render a yearly rent of twenty shillings a year to the feoffor and his heirs, and if they fail, that the feoffor shall re-enter; in this case also it seems the payment or tender must be upon the land; But if the condition be, that he shall render twenty shillings a year to a stranger, and his heirs; this is no rent, nor in the nature of a rent, and therefore in this case the feoffee must tender it to the person of the stranger where he can finde him at the day, or else he doth break the condition, and tender upon the ground is not sufficient. But in these cases if the nature of the thing to be done be such as will not admit of such a carriage from place to place to seek out the person of the feoffor, &c. there albeit the thing to be done be corporal or transient, and not a local thing, yet he that is to do it shall not be bound to seek out the person of the other; as for example, If an estate be made, on condition that the grantee shall deliver twenty quarters of Wheat, or twenty load of wood to the grantor at such a time, and no place is set for the doing thereof; in this case the grantee is not bound to carry the same about to seek the feoffor or grantor, as he is bound to carry money; but before the day, the grantee is to know of the grantor where he will appoint to receive it, and there it must be tendred. And the like law is for the most part in conditions of obligations.

To deliver wood or corn

It is best therefore in all these cases, and herein he that is to be the agent is to take care to have certainty of time and place set down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him.

Obligation.
A Caveat.

Fe: Just.
B idgem.

If a lease be made, on condition that the lessee shall pay to the lessor all such sums of money as the lessor shall pay out in such a business; in this case the lessor must first tender to the lessee a note of the charges before the lessee is bound to pay, and until this be done the condition cannot be broken. And after a note is given also, he shall have some reasonable time to provide the money. And if he render him a note of more then in truth he doth lay out, the lessee if he know it, may pay so much as is laid out, and he may refuse to pay any more.

4. In respect of other matters.
To pay money.

Co. 5. 22.

If lands be granted, upon condition that A shall make an estate of lands at the charges of B; in this case A must do the first act, viz. estate. notify to B what assurance he will make before B is bound to tender the charges.

To make an estate.

Pasche 17.
Jac. B. R.

If the feoffment be made, on condition that the feoffee shall give so much household stuff to the feoffor, or so much money for it as it shall be

To deliver household stuff, or pay money.
be

be rated at by two indifferent persons to this end to be chosen; it seems in this case the election of the two men must be by the feoffee: but if the words be by two persons to be indifferently chosen, then the election shall be by both parties, for in the first case the word Indifferent doth go to the prailing not to the persons.

To cleanse
ditches.

If a feoffment be made of a ground, on condition that the feoffee shall rake the ditches, in this case if the feoffee do it once it is a sufficient performance of the condition. And yet if a man grant a house for life, on condition that the lessee shall dwell and be resident in the house during the said term; in this case it is not sufficient that he dwell in it once during the term, but must do so all the term or else the condition is broken.

27 H. 8. 1.
Plow.
Colthurns
case 21.

To dwell in
the house.

If an annuity be granted of ten marks *per annum* to a man, on condition, or till he be promoted to a Benefice by the grantor, and it is not said of what value the Benefice shall be, in this case it shall be taken for a Benefice of as great a value, and of as good an estate as the Annuity is, otherwise the grantee may refuse it, and yet his Annuity shall continue.

Perk. Sec.
804.

To give goods

If a feoffment be made on condition that the feoffee shall give all his goods *si qua fuerint*, or give all his Pikes in his pond *si qua fuerint*; in this case the words shall be taken in the present tense, for the Goods and Pikes that are at the time of the grant. But if a feoffment be on condition that the feoffee shall give all his goods in *London si qua fuerint*, that did belong to *I S*, in this case the words shall be taken in the preterperfect tense.

Perk. sec.
742.

Not to disturb
the lessor in
raking the
wood.

If one make a lease of the Manor of Dale (wherein is a wood called Dale wood) excepting all the woods and underwoods growing in Dale wood, and all the great trees growing elsewhere, and this is upon condition that if the lessee shall disturb the lessor, to cut and sell the wood and underwood excepted, the lease to be void; in this case it seems the condition shall extend only to the wood and underwood in Dale wood, and not to the trees elsewhere; but if the words of the condition be [shall disturb &c. to cut &c the wood and underwood on the premises] *contra*.

Haward &
Fletchen
case.
Hil. 3 Car.
B. R.

To pay rent.

If one grant land rendring rent at the Feasts of S. Michael and our Lady day, or within a moneth after, on condition that if it be behind after the Feasts and days limited by the space of eight weeks that the lease shall be void; in this case the eight weeks shall be accounted from the moneth which is the twenty eight day after the Feast.

Dier 142.

If the condition be made in the copulative, and consist of divers parts, every part must be observed or the condition will not be performed. But when it is made in the disjunctive, if any part of it be observed, it is a sufficient performance of the condition. And therefore if a feoffment be made, on condition to reinfoff and pay

12 H. 7. 10
Co. super
Lit. 225.
Perk. sec.
746.
Dier 337.
372.

twenty

twenty pound and the feoffee do reinfcoff but not pay the twenty pound; in this case the condition is broken. But if the condition be to reinfcoff or pay twenty pound and the feoffee do one of them; it is a good performance of the condition. And when it is made in the copulative and disjunctive both, it shall be taken in the disjunctive onely, as if a lease be made to *A* and *B* his wife, on condition that the said *A* and *B* or any childe between them shall so long live; this shall be taken in this sense if the husband wife or childe shall so long live, so that the lease shall not be determined by the death of the husband or wife alone. If there be two provisos in two several indentures of conveyance of severall Manors to *A* and *B*, that if the feoffor pay or tender twenty shillings to *A* and *B* or the heirs of *A* that the Conveyance shall be void, and *A* dye; in this case tender to *B* is not sufficient, and it must be made to the heir of *A*, and it must be twenty shillings for every proviso: but otherwise it is of a collateral act.

If the words of a condition be thus, that upon such a contingent the party shall enter and retain the land untill the thing be done &c. in this case and by these words the estate is not determined as it is by these words [that the estate shall be void, or that the grantor shall reenter, or the like.] And in these words there is a difference also to be observed, for if the words be that upon such a contingent the estate shall cease and be void, and it be a lease for years to which the condition is annexed, the estate is *ipso facto* void without entry or claim, and can never be affirmed afterwards; but if the words of the close of the condition be, that the feoffor, lessor, &c. shall reenter, without any other words albeit it be in a lease for years, yet the lease is not void untill he hath made an actual re-entry. But in both cases if the estate to be voided be an estate in fee or for life, it is only voidable by the breach of the condition, and must be made void by entry or claim, and untill this be done the grantor can make no new estate of the land. But in the first case before the party shall retain the land and take the profits of it in the nature of a pledge untill the thing be done agreed upon in the condition, and then the other party shall have the land again. See more in the next question. And in *Obligation Numb. 7. Covenant. Numb. 6.*

The words of a condition may be performed and not the intent; and the intent may be performed and not the words; and then for the most part a condition is performed when the intent and meaning of it is observed. And therefore if a feoffment be made, on condition that the feoffee or his heirs shall make an estate to the feoffor and his wife in tail before such a day, and before the day the husband die, and then he make an estate as near it as he may, viz. to the wife for life without impeachment of waste, and after to the heirs of the body of the husband; this is a good performance

9 When and how a Condition or Limitation shall be said to be performed. Or not.

1. When the act is to be done between the parties themselves. To make an estate.

mance

Co. 3. 64.
super Lit.
203. 304.
Dier 6. 127.
11 H. 7.
21.

Co. 8. 90.
Lit. Sect.
352. Co. 3.
64. 282.
3 H. 4. 21.

mance of the condition. And if the condition be that the grantee shall make a feoffment of land; and he make a lease of the land first, and then a release to the lessee and his heirs; this is *TANTAMOUNT* and a good performance of the condition.

Co. super
Lit. 207.

Topay money.

If a feoffment be made, on condition that if the feoffor or his heirs pay ten pound by a day the feoffment to be void, and the feoffor before the day doth commit treason and is executed and do dyeth without heir, and after before the day the heir is restored, and he at the day doth pay the money; in this case this is a good performance notwithstanding there was once a disability. So as if heretofore one had made a feoffment, on condition to reiseoff by a day, and before the day the feoffee had entred into Religion, and then had been dearaigned, and at the day had made the feoffment; this had been a good performance of the condition.

Co. super
Lit. 222.
Perk. Sect.
802, 803.

By and to
whom money
shall be paid
upon a condi-
tion.

If a feoffment be made, upon condition that if the feoffee shall pay to the feoffor ten pound such a day, that then he shall have the land to him and his heirs, otherwise that the feoffor shall reenter; or if it be made on condition that the feoffee shall pay ten pound to the feoffor such a day; and before the day the feoffee sell the land; in this case the seller or the buyer either of them may tender the money at the day, and this will be a good performance of the condition, for he that hath interest in the land on the one side, or in the condition as party or privy on the other side, may tender and perform the condition to save the estate.

Co. 5. 96.
& super
Lit. 208.

If lands be mortgaged (or which is all one) if a feoffment be made of lands on condition that if the mortgagor or feoffor pay ten pound to the feoffee such a day that then the estate shall be void, and before the day the mortgagor or feoffor dye; in this case the heir or executor of the feoffor, the Ordinary, the Guardian in Chivalry or Socage of the heir of the feoffor, or any other by either of their commandment, precedent or assent subsequent may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition. And so also it seems is the law upon a devise of land to *IS* paying to *ID* twenty pound; if *IS* dye, his heir or executor may pay the twenty pound, and this is a good performance of the condition. But in these cases if a stranger of his own head without any such commandment or agreement pay the ten pound; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an Ideot, the payment or tender by any one in his behalf shall be a good performance of the condition. And if a feoffment be made, on condition that if the feoffor pay ten pound to the feoffee that the estate shall be void, and no time is set for the payment of this money, and the feoffor dye before any payment or tender made; in this case his heir cannot tender it and so perform the condition.

Lit. Sect.
534. 537.
15 H. 7. 2.
Co. super
Lit. 206.

Testament.

Lit. Bro.
Sect. 125.

Lit. Sect.
337.

If

Co. super
Lit. 207.
Bro. Con-
dition 109.

If a feoffment be made, on condition that if the feoffor and / s pay ten pound such a day the feoffment to be void, and the feoffor die before the day, and / s alone pay it; this is a good performance of the condition.

Co. super
Lit. 210. 5.
96. Dier
181. 101.
Co. 6. 69.
Lit. Sect.
939.

If a feoffment be made, on condition that if the feoffor pay to the feoffee or his heires ten pound such a day, and before the day the feoffee doth grant the land away to another; in this case the money may be paid to the feoffee himselfe, or if he be dead to his heires, and this payment is a good performance of the condition. And if the words of the condition be [That if he pay to the feoffee his heires or assignes &c.] in this case payment to either of them is a good performance of the condition; so as if in this case the feoffee make a feoffment over, it is in the election of the first feoffor to pay the money to the first or second feoffee, and if the first feoffee die, to pay it to his heire or the second feoffee: But payment to an executor or administrator in this case is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without words, heires, executors &c.] ten pound such a day, in this case the payment may be made to the executor or administrator of the feoffee after his death, and such a payment is a sufficient performance of the condition; And if the words of the condition be [that if the feoffor pay to the feoffee, his heires, executors or administrators &c.] in this case payment to either of them is a good performance of the condition. But payment to an assignee in this case is not good. And if the words be, that if he pay to the feoffee and his heires, &c. in this case payment to his executors or to his assignes is not a good performance of the condition. So that in all these cases it seems for the person to whom payment is to be made the words of the condition are precisely to be pursued.

Pal. 9 Jac.
5. Sir
Richard
Lees case.

If a feoffment be made on condition that if the feoffor shall tender twelve pence to the feoffee such a day the feoffment to be void, and afterwards the feoffee is disseised of the land, and after the feoffor doth tender the twelve pence to the feoffee at the day; this is a good performance of the condition.

Dier 69.
41 E. 3. 25.

If a feoffment be made to two men, on condition that they shall reinfeoff the feoffor, or make a lease to him by a day, and before the day one of them die, and the survivor doth reinfeoff, or make the lease; this is a good performance of the condition. And so also it seems the law is if both the feoffees be living, for by his own acceptance it seems he hath dispensed with the condition and so cannot enter for the breach of it.

Flow. 23.
5 H. 7. 4.
1 H. 6. 20.

If a feoffment be made in condition that the feoffee shall infeoff the feoffor of the Manor of Dale by such a time, and before the time appointed the feoffee doth grant a rent charge out of the Manor to a stranger, and then at the time appointed makes a feoffment

ment of the Manor according to the condition; in this case this is a good performance of the condition. But if in this case the feoffee before the time appointed grant away to a stranger twenty acres parcell of the Manor, and then doth make a feoffment of the Manor according to the condition; this is no good performance of the condition. And if a feoffment be made on condition that the feoffees or lessees in trust of such land shall grant an Annuity out of it; and some of them only do grant this Annuity; this is no good performance of the condition.

To make a lease.

If there be a feoffment made, upon condition that the feoffee shall make a lease of land to the feoffor for life, the remainder to *F.S.* in fee, and the feoffee make a lease to the feoffor for life; and after by another deed doth grant the reversion to *F.S.*, this is a good performance of the condition. 41 E. 1. 21.

To purchase lands.

If a feoffment be made upon condition that the feoffee shall purchase lands or tenements to the value of twenty pound *per Annum*; and he purchase a rent common, or any such like thing to that value; this is a good performance of the condition. But if in this case the feoffee and another purchase so much land together jointly; this is no good performance of the condition. So if the feoffee alone purchase lands to the value of twenty pound *per Annum*, and there is a rent issuing of it which must be deducted; this is no good performance. And yet in these cases, if the stranger Jointenant release to the feoffee all his right in the land; or the grantee of the rent release to him the rent before the time of the performing of the condition; the condition is well performed in both cases. *Tantum valet terra quantum vendi potest.* And if one make a feoffment in fee, on condition that if the feoffee purchase land to the value of twenty shillings, the feoffment shall be void, and after the feoffee disseise another man of land to that value: it is said that by this the condition is performed, *Sed queri.* And that if he recover so much land in value in an action: that this is no performance of the condition. *Sed queri.* For this seems to me a better performance of the condition then the former.

Perk. Sed.
807, 808.
21 H. 6. 23
Dier 15.

Perk. Sed.
812.

Payment.

To pay money.
Tender.

If lands be granted, on condition to pay money, and the money is tendered according to the condition, but either no body is ready to receive it; or it is refused; this is a good performance of the condition. And after a man hath once refused the money so tendered to him according to the condition; he hath no remedy in law to recover it except it be money lent upon a mortgage. And if the payment be made part of it with counterfeit Coin; and the party accept it and put it up, this is a good payment and consequently a good performance of the condition. And if at the day of payment the parties do account together, and he to whom the money is to be paid being indebted to the other, that debt by agreement

Dier 131.
Lit. Sed.
334, 335.
338.
Co. super
Lit. 209.

Terms of
the law,
tit. coins.

Co. super
Lit. 272.
Fitz. Barre
243.

Acceptance.

greement

Co. Super
Lit. 312.

Dier 45.
Co 5. 96.

Perk. Sect.
392.

Adjudge-
Mich. 40.
& 41 Eliz.
B. R.
Powelver-
fus Bar-
sholomew.

Co. 5. 96.
Super Lit
309.

14 H. 8. 17.

Perk. Sect.
746.
See before

Co. Inpe-
44. 239.

agreement is allowed, and the residue is paid and accepted; this is a good performance of the condition. So if the party that is to receive it accept and take new security by bond or statute for the money; this is a good performance of the condition. And so in most cases, when by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way; this is a good performance of the condition. *Volenti non fit injuria*. But if the thing to be done be to be to a stranger, & one that is no party to the condition and it be done in any other manner, and he accept thereof; this is no performance of the condition. And so also if the time of doing the thing be past, as if one make a feoffment to me, on condition that if he pay me ten pound such a day the feoffment shall be void, and he doth not pay me at the day, but doth dye, and after by agreement between his heir and me he doth pay me the ten pound, and I receive and accept it, and thereupon I suffer him to enter and hold the land: in this case the condition is not performed: but I may enter upon him and out him notwithstanding.

If the mortgagor pay the money according to the condition and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed and the mortgage discharged notwithstanding.

If a feoffment be made to I. S. on condition that if the feoffor pay to the executors or administrators of I. S. ten pound, the feoffment shall be void, and I. S. dye, and the ten pound is paid to the Executors of I. S. according to the condition, but it is covinously done, i. there is a private agreement that the feoffor shall have all, or part of his money again: this payment in this case is no good performance of the condition, but that payment that must be a performance of a condition in this case to fetch lands out of the hand of an heir must be real, full and effectual.

If a lease be made, on condition that the lessee shall get the good will of I. S., and the lessor doth come to I. S. first and ask his good will, and he deny it him, and after when the lessee doth ask if he doth grant it him, in this case the condition is performed. So if the condition be, that he shall get his good will by such a day, and at the first being desired he denyeth it, but afterwards and before the day he doth grant it. And yet if no day be set, and he desire his good will and I. S. denyeth it, and afterwards he doth get his good will, it seems this is no performance of the condition.

To get the
good will of
I. S.

If there be two things in the copulative to be done by the condition, both must be done, otherwise the condition will not be performed.

If a feoffment be made, on condition that if the feoffor and I. S.

pay

2. When the act is to be done by a stranger, to pay money.

3. When the act is to be done to a stranger. To make an estate.

* Tender.

pay ten pound at Michaelmas the feoffment shall be void, and before the day the feoffor dye, and IS pay the money; this is a good performance of the condition. But if the feoffor be living

contra.

If a feoffment be made on condition to make an estate to a stranger by a day, and before the day he dye; in this case if an estate be made as near the condition as may be, it is sufficient.

* If a feoffment be made to IS on condition that he shall infeoff ID and his heirs; and IS doth tender the feoffment to ID and he doth refuse to take it; this is no performance of the condition in this case. But if it be to be done to the feoffor himself *contra.* And so also it is, if the condition be to make an estate tail, or any lesser estate to a stranger, and he tender it, and the stranger refuse it: this is no good performance of the condition. And if a feoffment be made, on condition to reinfeoff the feoffor and his wife in tail, the remainder to W in fee and he tender it to the wife onely and not to him in remainder; this is no good performance of the condition.

And the same law for the most part is in conditions of obligations. See more in *Obligations* at Numb. 9

10. What act shall be a breach of a condition in deed. And when a condition in deed shall be said to be broken. Or not.

Not to alien.

If a feoffment be made, on condition that the feoffee shall not infeoff IS of the land, and the feoffee doth make a feoffment to IS and ID; this is a breach of the condition. And so also it is if the feoffee make a feoffment to ID to the intent that he shall alien to IS. *Quando aliquid prohibetur fieri directo prohibetur & per obliquum.* And yet if the feoffee in the case before alien to ID and after he doth alien to IS, this is no breach of the condition. And if the condition be, that the feoffee shall not infeoff IS and he dye, and his heir infeoff IS, this is no breach of the condition.

If a lease for years be made, on condition that the lessee shall not assign, or alien the term, or the land during his life without the license of the lessor, and the lessee doth give it by his will without license; this is a breach of the condition and forfeiture of the estate; But if he make an executor of his will onely, this is no breach. And if the condition be that the lessee shall not alien, and he dye, and his executor alien, this is no breach of the condition, And if the condition be that the lessee shall not alien but to his children, and the lessee by Will devise it to his executors: it seems this is a breach of the condition. So if he devise that A his son shall have his term after his wife, and doth make A his son his executor, it seems this is a breach of the condition. But if he do not make A his executor *contra.* And in cases of device albeit the executors do not assent; yet the condition is broken, as in case where a reversion is granted on condition that the grantee shall not alien it, and he doth alien it, but no attornment is to this grant; yet it seems this

Flow. 133.
Co. 3. 64.

Co. super,
Lit. 209.
9 H. 6. 67.
Perk. Secd.
8 s. 5. 8. 16.
2 E. 4. 2.
29 H. 6. 67.

Co. super
Lit. 222.
Dier 45.
46.

Dier 45.
65.

Per 3 Just.
ces. B. Ro.
3 Jac.

Dier 6. is a breach of the condition. And if a Lease for years be made, on condition that the Lessee or his Assigns shall not alien, and the Lessee doth make his Wife his Executrix, and she doth take another Husband, and he doth alien it; it seems this is a breach of the condition, and a forfeiture of the estate. But if a Lease be made on condition that the Lessee shall not alien without the license of the Lessor, and after the Lessor dye, and the Lessee assign, or the Lessee dye, and his Executors or Administrators assign, this is no breach of the Condition in either of these cases: So if a Lease be made, on condition that the Lessee shall not alien the term during his life, and he makes an Executor, but doth not devise it to him; this is no breach of the Condition. And if a Lease be made, on condition that the Lessee, his Executors or Assigns shall not alien the term to any persons without the license of the Lessor, but to the Wife or one of the Children of the Lessee, and the Lessee dye, and his Executors alien to one of the Children of the Lessee, and he alien to a stranger without license; this is no breach of the Condition. And if one make a Lease of a House and Land, on condition that the Lessee shall not parcel out the land or any part of it from the house, and the Lessee doth grant all his term in the house and part of the land, and doth keep the rest, and after doth lease that part also; this is a breach of the Condition.

Dier 132.
Co. 4. 120.

Hil. 38 El.
Marth ver.
ius Curtis.

Co. 8. 92.

If a Lease be made of a house, on condition that the Lessee shall not suffer any woman great with childe to harbor or lodge in the house six days after notice given by the Lessor, and the Lessee do suffer any such person after notice given, albeit the Lessor consent to it; yet the Condition is broken. But if the Lessor do *volens volens* keep such a woman there against the mind of the Lessee; this is no breach of the Condition.

Not to suffer
a woman
with child
in
the house.

22 H. 4. 5.
Bro. Con.
dition 40.

If a Lease be made, on condition that if any waste be done the Lessor shall re enter; in this case if the house fall by a tempest, this is no breach of the Condition, for this is not waste: but if it be uncovered by tempest, and the Tenant hath a convenient time to repair it, and doth not, but doth suffer the timber to perish for want of covering; this is a breach of the Condition, and the Lessor may enter and put out the Lessee. And if a Lease be made, on condition that the Lessee shall not do waste, and he suffer waste to be made in decay of the houses &c. it seems the condition is broken.

Not to do
waste.

Per Dier
& Walsb
Justices.
Dier 131.

Sed quere.

Dier 13.

If a Lease be made, on condition that if the Lessee be minded to sell his estate the Lessor shall have the first offer thereof, giving as much as another will give; in this case if the Lessee doth not give notice when he is minded to sell it, he doth break the Condition: But if when he is minded to sell he doth tell the Lessor

Not to sell till
the Lessor re-
fuse it, to any
other.

of his purpose, and what he is offered for it, and the Lessor doth either say he will not have it, or that he will not give so much for it, or doth not accept it, but doth delay, &c. and then the Lessee doth sell it to another, this is no breach of the Condition, neither is he bound to wait upon him in this case.

To make an estate.

If a feoffment be made, on condition that the Feoffee shall make a feoffment in fee, gift in tail, Lease for life or years of the land to the Feoffor, or to a stranger by a day; and before the day the Feoffee doth disable himself to do it, either by making some estate of the same thing to some other person in tail, for life, years, in present or future, or for one year; or by taking a Wife whereby she may be entituled to dower, or by suffering a recovery of the land, or by granting of any Rent, Common, or the like, or by entering into any Statute &c. or by suffering any Judgement to be had against him, or by doing any other such like act, whereby he cannot convey the land according to the Condition in the same plight, quality, and freedom it was at the time of the conveyance made: In either of these cases the Condition is *ipso facto* broken.

Co. super
Lit. 211.
322.
Co. 2. 98.
Perk. 362.
202. 803.
Lit. 362.
335.
Co. super
Lit. 208.

And albeit the land be afterward discharged, and the party again enabled before the day to perform the Condition, yet this will not save the breach. And so also it is of a limitation. But when the Condition is to be performed of the part of the Feoffor or Grantor, there disability before the time will not hurt; so as he be again enabled at the time. And so also it is when the Condition is to be performed of the part of the Feoffee, and there is no certain day set for the performance of the thing, for albeit in this case he be once disabled, yet if he be afterwards again enabled, and do it within the time that the Law doth give him to do it; in this case the Condition is not broken. And so also it is, if the Feoffee be disseised, and during the disseisin, he do any such act as before, in this case before his entry this is no breach of the Condition, for till then the charge doth not binde the land. And so likewise it is when the disability doth proceed from another cause; as where one doth make a feoffment, on condition that the Feoffee shall re-infeoff before such a day, and before the day the Feoffor disseise the Feoffee and keep him out till the day be past, or one doth make a feoffment, on condition that the Feoffee shall marry B before such a day, and before the day the Feoffor himself doth marry her, so that the Feoffee cannot perform the Condition, in these cases the Condition is not broken.

To employ the profits to charitable uses.

If one make an estate of lands (held in Capite) on condition that he to whom it is made shall employ the profits thereof to divers charitable uses, and he die, his Heir within age, by reason wherof the King hath the land during the minority of the Heir,

Trin. 1339.
Slade vers.
Tompson
B. R.

heir, so that the profits cannot be employed; this is no breach of the Condition.

Co. 1. in
Porters
case.

If one make a feoffment of land, on condition to reinfcoff in convenient time, and the Feoffee doth not so, but make a Lease to another; this is a double breach of the Condition. And the same Law is of a Devise by Will in this manner.

To reinfcoff.

Perk. Sect.
796.
Co. 8. 90.
See the Pri-
vile Mar.
21, 28.

If a feoffment be made, upon condition that the Feoffee shall make some estate to the Feoffor, or some other, by a day, and the Feoffee before the day say to him to whom the estate is to be made, that he will never make the estate, notwithstanding he doth make the estate before the day according to the Condition; in this case it is said the Condition is broken. *Sed quere* of this, for it seems if he really deny it before, and actually perform it at the day; that this is a good performance of the Condition. As if a Lease be made of an house, on condition that the Lessee shall not disturbe the Lessor in the taking away of his goods out of the house, and when the party doth come or send to fetch them the Lessee doth onely forbid them; this in this case is no breach of the Condition, and it was agreed in this case that words without some deeds, as shutting the door against them, forcible resistance, or laying of hands upon them, or the like, are no breach of such a Condition.

To make an
estate.

To suffer one
to take his
goods.

3 H. 4. 2.

And if a Lease be made, on condition that the Lessor shall be four times a year in the house demised without being ousted by the Lessee, and the Lessee seeing him coming do shut the doors or windows against him; this hath been thought to be no breach of this Condition.

To suffer one
to come into
a house.

Dier 33.

If a Lease be made, on condition that the Lessee shall pay yearly to the Lessor during the term ten pound; in this case if he fail of payment once, the Condition is broken and the estate forfeit. So if one make feoffment in fee of land, on condition to pay ten pound yearly to I S; if he fail once, the Condition is broken.

To paya year-
ly rent or sum

Penner v.
Glover 37.
& 38. El.
Mich. B. R.
per curiam

If a Lease be made of a Manor in which are divers Copyholders, on condition that the Lessee shall not molest, vex, or put out any Copyholder paying his duties and services, in this case if the Lessee enter upon, and put out any one Copyholder, this is a breach of the Condition. But if he enter *vi & armis* upon a Copyholders tenements, and there beat him onely, or the like; this is no breach of the Condition.

Not to molest
Copyholder.

Crompton Ju.
64. 65.

If there be a Condition to pay rent, and the Lessee let part of the land to other under-tenants, or let all the land to another for part of the time, and he undertake the rent still, and fail of payment; in this case the Condition is broken and the estate forfeit. But if there be any covin and practise in the case between the first Lessor and the Lessee, the under-tenants may perhaps have relief in equity.

To pay rent.

Equity.

Co. 8. 90.

If one make a Lease for years of land, and then also make a feoffment in fee of the lands, on condition that if the Lessee be distur-

Not to disturb

bed in his term that he shall have the fee simple, and he is disturbed by the Feoffor or his means; in this case the Condition is broken, and the Lessee shall have the fee simple. But if the disturbance be by a stranger, and not by the feoffor, or by his means or consent, this is no breach of the Condition.

Not to be
outlawed.

If a Lease be made, on condition that the Lessee shall not be outlawed, and he is outlawed without proclamation, it seems this is no breach of the Condition, because the outlawry is not good.

Per. a. Ju-
rices. H.
7 Jac. B.R.

If a Condition possible at the time of creation become after impossible in part by the act of God, and the party do not perform that which is possible, the Condition is broken.

Lit. sect.
352.
Co. 2. 59.

If a man make a Lease for years on condition, and the Lessee doth not know of it, and after the Lessor doth by Will give the land to the Lessee without condition, and the Lessee doth such an act as is breach of the Condition; in this case the Condition is not broken, for the Lessee must have notice of the Condition ere he can break it.

Co. 8. 92.

To pay rent.

If a Lease be made rendering rent, on condition, that if the rent be not paid within twenty days the Lessor shall re-enter, and the rent is not paid; in this case the condition is broken, but the Lessor cannot enter until he hath made a legal demand, and if he die before he do it, his heir shall never take advantage of that breach, but it is discharged for ever.

Doct. &
Stu. 35.
33 H. 4. 17.

When an act is to be done in time convenient, or otherwise, and the party do it not by the time appointed by law, the condition is broken.

Lit. sect.
353.
Plov. 30.

To give advise

If one grant an annuity *pro consilio impenso & impendendo*, and the Grantor require advise, and the Grantee refuse or neglect to give it; this is a breach of the Condition, and a forfeiture of the estate. And if the Deed be, that he shall go to such a place to give counsel, and he require him to go thither and he refuse it, this is a forfeiture of the estate. But if he refuse to go with him to another place, or give counsel to his adversary being not required to give counsel to him, this is no breach of the Condition nor forfeiture of his annuity. And if one had heretofore devised his land to be sold by his Executors, and to have been distributed for his soul, and the Executors had not sold it in time convenient, or had taken the profits to their own use: this had been a breach of the Condition. See more in the last foregoing division, and in *Obligation Num. 10. Covenant Num. 7.* The same law is for the most part of Conditions of Obligations. See *Obligation Num. 10.*

22 Ed. 3. 7.
8 H. 6. 34.
Dier 269.

Lit. Sect.
389.

11. When a
condition in
law shall be
said to be
broken; Or
not.

Forfeiture.

Every particular estate hath a condition in law annexed to it, and therefore if tenant for life in dower, by the curtesie, or after possibility of issue extinct, lessee for years, tenant by statute merchant, elegit, or the like make any absolute or conditional estate of the lands they hold in fee simple, fee tail, or for life and give livery of seisin thereupon or levy a fine *Sur consance du droit*, or suffer a recovery of the land

Co. 2. 15.
2. 44. Super.
Lit. 233.

or

or the like; this is a breach of the condition in Law, and a forfeiture of their estate. And if any such tenant (except tenant in tail after possibility of issue extinct) do waste in the lands they do so hold; this is a breach of the condition in Law, and a forfeiture of their estate in so much as the waste is committed. But if an infant or feme covert that hath such an estate shall make any such estate &c. this is no breach of the condition in law. And yet if such a person do waste, this is a breach of the condition in law. And so also if any such person be an Officer and do any thing which is a cause of forfeiture in another; this will be a forfeiture in him or her also.

Infant.
Women-co-
vert.

Co. Super
Lit. 223.

If any Keeper of a Park without warrant kill any Deer, fell or cut any Wood, and convert it to his own use, pull down the Lodge or any house within the Park used for hay for the Deer, or the like; this is a breach of the condition in law. So also if a Keeper shall not look to the Game, but the Deer be killed by his default, and damage come to the Lord; by this also the condition is broken. But the not attending upon such an office for two or three dayes, if the Lord have no special loss thereby, is no cause of forfeiture.

Co Super
Lit. 234.

Officers that are for the Administration of Justice, or of Clerkship in any Court of Record, or concerning the Kings Treasure, Revenue, Account, Alnage, Auditorship, &c. have also conditions in law annexed to them, and therefore if such Officers shall sell their offices or misdeemean themselves in their Offices: by this the condition in law may be broken, and they may forfeit them.

Lit. 5. 24.
247. 249.
175. Co. 3.
68. 247.
5. 56. Dier
111. Co.
Super Lit.
21. 215.
Doct. &
Stud. 93.
Perk. sect.
830. 831.
233. 835.
P. 10. 488.
(8).

As no man may create or annex a condition to an estate but he that doth create the estate it self, so neither can a man give or reserve the power, title or benefit of re-entry and avoidance of an estate upon the breach of a condition to any other but to him, or them, or at least to one of them that doth make the estate, his or their Heirs, Executors and Administrators &c. for it is a rule of the Common Law, That none may take advantage of a condition, but parties and privies in right and representation, as Heirs, Executors, &c. of natural persons, and the successors of politique persons: and that neither Privies nor Assignees in Law, as Lords by Escheat, nor indeed, as Grantees of reversions, nor Privies in estate, as he to whom a remainder is limited, shall take benefit of entry or re-entry by force of a condition. And therefore if a man had made a Lease for life reserving rent, on condition that if the rent be behinde, the Lessor, his Heirs and Assigns shall re-enter, and after had granted the reversion to a stranger; this Grantee should not by the Common law have had benefit by this condition. But if the Lessor had died, his Heir or the Guardian in Chivalry or Socage of such an Heir if he had been an Infant

12. Who may
enter for a
condition bro-
ken. And
what persons
shall take ad-
vantage of a
condition or
a limitation.
And what
not.

and inward might have taken advantage by the condition. And if one had been possessed of a lease for years, and had granted his term upon condition and had died, his executors or administrators might have advantage of this condition.

And at this day the law is still the same as touching Privies in blood, for an heir shall take advantage of a condition, though no estate descend to him from the Ancestor. And therefore if one be seised of land of the part of his mother, and he make a feoffment in fee of it, on condition, and dye, and the condition is broken, in this case the Heir of the part of the father shall enter, but as soon as he hath entred, the Heir of the part of the mother shall enter upon him and enjoy the land. And if a man be seised of land in the right of his Wife, and he make a feoffment in fee of it, upon condition, and dye, the Heir of the Husband shall enter for the condition broken, but the Wife shall have the land. And so also is the law as touching Privies in right and representation, for Executors and Administrators shall take advantage of a condition now as heretofore. And so also shall the Successors of a Dean and Chapter, Bishop, Arch-deacon, Parson, Prebend, or any body Politique or Corporate, Ecclesiastical or Temporal; these shall take advantage of conditions as heretofore they did. So also the law is the same as touching Privies in law, for they shall no more take advantage of a condition now then heretofore. But as touching grantees of reversions and Privies in estate, there is some alteration made of the Law: For by a new Law it is provided, That all persons which shall have any grant of the King of any reversion &c. of any lands &c. which pertained to Monasteries &c. as also all other persons being grantees or assignees &c. to or by any other person or persons, and their Heirs, Executors, Successors, and Assigns, shall have like advantage against the feoffees &c. by entry for not payment of rent, or for doing waste, or for other forfeiture &c. as the said lessors or grantors themselves ought or might have had.

And for the true understanding of the sense of this Statute, and the antient Common Law further touching this point. 1. These diversities must be observed to be taken, before the Statute will take place.

1. Between a condition that doth require a re-entry, and a limitation that doth *ipso facto* determine the estate without entry, for albeit a stranger might not take advantage of the first, yet he might take advantage of the last by the Common Law. And therefore if a man at this day make a lease to another *quousque*, or untill I come from Rome, or if a man make a Lease to a woman *quandiu casta vixerit*, or if a man make a Lease to a widow.

Co super
Lit. 202.12

Stat. 32H.
8. cap. 34.

Co super
Lit. 211.
Plow. 27.

Co. 10.36.
F.N.B. 301

widow *secundum in pura virginitate videret*, or if a man make a lease to another for one hundred years if he live so long, and then the lessor doth grant the reversion to a stranger; in all these and such like cases the grantee of the reversion may take advantage of the limitation, for after the estate is ended by the limitation he may enter.

2 Between a condition annexed to a freehold, and a condition annexed to a lease for years, for if before the Statute a man had made a gift in tail, or lease for life, on condition that if the donee or lessor did not pay ten pound by such a day the gift or lease should be void or cease; in this case the grantee of the reversion could not by the Common law have taken advantage of the condition, for it could not be void or cease but by entry, which could not be transferred to another. But if a lease for years had been made on such a condition; a grantee of the reversion might by the Common law have taken advantage of this condition, for the estate in this case was by the breach of the condition *ipso facto* void without entry. But now the grantee of the reversion shall have advantage of the condition in both these cases.

Co. super
Lit. 214.

3 Between a condition in deed and a condition in law, for by the very common law, not only the grantee of the reversion, but also the Lord by Escheat, may either of them have advantage of a condition in law for any breach in his own time.

Co. super
Lit. 214.

2. These Resolutions and Judgements upon the Statute must be marked. 1. That the Statute is general, and the grantee of the reversion of every common person, as well as the King, may take advantage of conditions. 2. That the Statute doth extend to grants made to the Successor of the King as well as to the King, albeit he only be named in the Statute. 3. That he that comes to the reversion by fine, feoffment, grant, limitation of use, common recovery, or bargain and sale, is such a grantee as is within the intendment of the Statute. 4. That where the Statute doth speak of feoffees, &c. that it doth not extend to gifts in tail, and therefore if a gift in tail be upon condition, and after the donor doth grant the reversion; this grantee shall never have any benefit of this condition. 5. That where the Statute doth speak of grantees and assignees of the reversion; that hereby an assignee of part of the estate of the reversion may take advantage of the condition, as if I see for life be, and the reversion is granted for life, &c. or if lessee for years be &c. and the reversion is granted for years, &c. in these cases the grantees of the reversion shall have advantage of the conditions.

* Davys
and Ma-
thews case
per 2 Justi-
ces. Trin.
14. Jac.
B.R.

* So if a lessee for One hundred years make a Lease for Ten years, rendering rent, with condition of re-entry, and the first lessee doth afterward grant his term and estate to I S; in this case I S

is such a grantee and assignee of the reversion as shall take advantage of the condition. 6. That as well mediate as immediate grantees, i.e. the grantees of grantees *in infinitum* are intended within this Statute. 7. That a grantee of part of the reversion cannot take advantage of a condition by this Statute. And therefore if a lease be made of three acres reserving rent upon condition, and the reversion is granted of two of the three acres; in this case the rent shall be apportioned, but the condition is destroyed except it be in the Kings case. And yet a condition may be apportioned by the act of law, or by the wrong of the lessee. As if a lease be made of two acres (the one of the nature of Burrough English, and the other at the Common law) upon condition, and the lessor having issue two sons dieth; in this case each of them shall enter for the condition broken. And if the lessee upon condition make a feoffment of part of the land; this doth not destroy the condition. There is therefore herein a difference between a condition that is compulsory, and a power of revocation that is voluntary: for he that hath such a power may by his own act extinguish it in part, by levying a fine of part of the land or otherwise, and yet his power may remain for the residue, as in the case of a limitation; but in the case of a condition he cannot do so. 8. Such grantees as shall have advantage by this Statute, must be complete grantees; And therefore grantees of reversions by fine or deed, must have attornment ere they can take advantage of the condition. And yet if a reversion be granted by fine to one that hath no attornment, and he grant it to another that hath an attornment: in this case the second grantee shall take advantage of the condition, albeit the first grantee shall not. And the lessee must have notice of the grant of the reversion, ere he in reversion can take any advantage of a condition. And therefore it is, that if the lessor bargain and sell the land by deed indented and enrolled (in which case there needs no attornment;) or if the lessor make a feoffment of the land, and so out the lessee, and the lessee enter (which is an attornment in law;) the grantee or reoffee in these cases cannot take advantage of any condition before he hath given notice to the lessee of this grant of the reversion. 9. Such as come in merely by act of Law, or paramount as the Lord of a Villain, the Lord by escheat, the Lord that doth enter for Mortmain, or the like, cannot take advantage of a condition within this Statute. And hence it seems it is that if lessee for forty years make a lease for thirty seven years on condition, and after surrender his estate to his lessor; that the surrendree shall not have advantage of this condition. 10. *Albeit the words of the Statute be general, yet grantees and assignees shall not take benefit of every forfeiture by force of a condition, nor yet of all conditions, but onely of such as are inherent:

i.e. such

Prerogative.
Apportion-
ment.

Power of re-
vocation.

Co. 5. 113.
113. Co.
Super Lit.
214.

Co. 5. 113.
114. Co. 8.
92.

Co. Super
Lit. 214.
Palch. 7.
Jac Co. 8.
per 2 Justices.
*Co. Super
Lit. 225.
Dier 309.
Curia in
Locks case
Palch. 7.
Jac. Co. B.

i. e. such as are either incident to the reversion, as for payment of rent, or for the benefit of the State, as for restraining of wast, for causing of reparations, making of fences, skowring of ditches, preserving of woods, and the like. And of conditions that are collateral, such grantees shall not take benefit. And therefore if the condition be for payment of a sum of money in gros, to restrain alienation, for the delivery of corn, wood, or the like, the grantee of the reversion of the land shall not have advantage of it by this Statute, for these remain as they were before the Statute at the Common Law. 11. Such conditions as are on the part of the lessor, it seems are not within this Statute; And therefore if one make a lease for years, on condition that if the lessor, his heirs or assigns, pay ten pound to the lessee at our Lady day, the lease to be void, and the lessor doth grant the reversion to a stranger before the day; it seems the grantee shall not take advantage of this; but the condition is gone.

Per Justice
Briagman.

Doct R^o t.
35. 13 H.
4. 17.

If one make a lease for years rendring rent to him and his heirs, on condition that if it be not paid within fourteen days, that he and his heirs shall re-enter, and the rent is behinde, and the lessor doth demand it, and then die; in this case the heir may enter. But if he dye before demand, the heir cannot make a demand, and so take advantage of that breach of the condition, which was in the time of his Ancestor

Perk. Sec^r,
834.

If a man be possessed of land for twenty years in the right of his Wife, and he make a lease of it for ten years rendring rent, with condition of re-entry for default of payment and after the husband die; in this case the wife shall have the rent, but it seems she shall not take advantage of the condition

Co. 185. su-
per Liu.
379. Dier
127. 117.

If a lease be made to *I S*, on condition that if such a thing be, or be not done, that the land shall remain to *I D*, or that *I D* shall enter, in this case *I D* shall never take advantage of this condition either by the Common law, or by this Statute.

Co. super
L. t. 218,
237.

Regularly where a man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter, he must make a claim, for an estate of freehold or inheritance will not cease without entry or claim. And he that is to have advantage by the condition, may wave his advantage if he will. And until such entry or claim made the party that should enter can make no good estate of the thing to any other. But herein a difference is to be observed in the penning of a condition, and between a lease for years, and a lease for life, or a greater estate: for if a lease for years be made, on condition that upon such a contingent the estate shall cease, or the lease shall be void; in this case when the thing doth happen, the lease is *ipso facto*, void without entry or claim. But otherwise it is of a lease for life, albeit there be the

13. Where entry or claim is needful, to avoid an estate on condition. And where a man may take advantage of a condition without entry or claim. And where not.

the same words in the condition. And if one make a lease for years, on condition that if such a thing be done, the lessor shall re-enter, in this case an entry is needful to avoid the estate.

If one make a feoffment in fee, gift in tail, or lease for life, on condition that upon such a contingent the estate shall be void; in this case there must be an entry made, after the condition is broken to avoid the estate. So if one bargain and sell his land by deed indented and inrolled, with proviso that if the bargainor pay, &c. then the estate shall cease and be void, and he doth pay the money; in this case the estate is not re-vested in the bargainor before an actual re-entry is made. And so it is also, if lands be devised to a man and his heirs, on condition that if the devisee do not pay twenty pound at a day, this estate shall cease and be void; in this case the estate is not void until an actual re-entry be made. And so also it is if a reversion, remainder, advowson, rent, common, or the like, be devised on such a condition; in these cases there must be a claim before the estate will be determined. And therefore if a man grant such a thing to another and his heirs, on condition that if the grantor pay twenty pound on such a day; the estate of the grantee shall cease or be void, and the grantor doth pay the money according to the condition; in this case the estate is not re-vested in the grantor before a claim made at the Church in case of an Advowson, and in the other cases upon the land. But in case where a man cannot make an entry or claim, there the law will not compel him to it. And therefore if one grant land to another for five years, on condition that if he pay to the grantor within the two first years forty marks, that then he shall have the fee, otherwise but for term of five years, and livery of seisin is made accordingly, and the grantee doth not pay this money; in this case after the two years are past, the freehold shall be in the grantor without entry or claim; for as this case is, he cannot enter but he must out the lessee of his term.

a Rent.

a 14. When a condition broken shall make the estate, &c. void *ab initio*. And when not. And to what intents the lessor, feoffor, &c. shall be adjudged by his re-entry to be in of his first estate. And to what intents not.

So if I grant a rent charge out of my land upon condition; when the condition is broken, the rent is extinct, and here needs no claim. So if a man make a feoffment of land to me in fee, on condition that I shall pay him twenty pound such a day &c. and before the day I let the land to him for years, rendering rent, and after the condition is broken; in this case he may retain the land without entry or claim, and the rent is extinct. So if one covenant to stand seised to the use of himself for life or otherwise, and then after to the use of others, with a proviso of revocation &c. and after he doth revoke it; in this case all the estates are re-vested in him without entry or claim.

b It is generally true, that he that doth enter for a condition broken, doth make the estate void *ab initio*, and that he shall be in of his first estate in the same course and manner as it was when he departed

Co. 4. 220.
Perk. 1. 6.
840. Plow.
186. 482.
14 H. 8. 17.

ted

red with the possession, and at the time of the making of the condition. And hence it is, that if there be any charge or incumbrance on the land, as if lessee of land upon condition grant a rent, charge out of the land, or enter into a Statute or Recognizance, and the conusee have the land in execution, and this charge after the condition is made; in this case when the condition is broken, and the party doth re-enter, he shall by relation avoid the rent, Statute and Recognizances, and hold the land freed from them all. And if an estate be to pass by way of increase, upon condition, or a lease is to be made upon a condition precedent; when the condition is performed, the party shall hold his estate free from all after-charges and clogs. And if a man enter for breach of a condition in law, he shall avoid all charges and acts done after that thing is done which doth produce the forfeiture, but he shall not avoid any thing done before that time; for he must take the thing as he findes it: as if a house or land belong to an officer in respect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this case the rent shall continue. And if lessee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this case the rent shall continue, and the lessor cannot avoid. But if lessee for life of land make a feoffment in fee of it, and then grant a rent out of the land; in this case the lessor shall avoid it. And if a lessee grant a rent out of his land, and then do waste, and the lessor recover the land, he cannot avoid this rent, but shall hold the land charged with it. But if the lessee do waste first, and then he grant a rent charge to a stranger out of the land, and after the lessor recovers the place wasted; in this case he shall hold the land discharged. And if lessee for life make lease for years, and after enter upon the lessee for years, and make a feoffment in fee; this shall not avoid the Lease for years. And if a man make a lease for years, rendring rent, with clause of entry for non payment, and the lessee doth make under leases of part of this land, and after the rent is unpaid, and the lessor doth enter; in this case he shall have all the land, and avoid all the under-leases. But if there be any covinous practise in the case, the under-tenants may have remedy in Equity. And if a lease be made for life, the remainder in tail on condition; in this case if the condition be broken, both the estates be avoided. *Et sic de similibus.* But this general rule doth fail in divers particulars: as if a man be seised of land in the right of his wife, and he maketh a feoffment in fee by deed indentured, upon condition that the feoffee shall devise the land to the feoffor for life &c. and the Husband dieth, and then the condition is broken; in this case the heir of the husband shall enter, and yet he shall not have the estate of the feoffor, for this doth presently after his entry vanish away. So if a tenant in special tail hath issue,

Co. super
Lit. 234.
Perk. sect.
842, 844.
Co. super
Lit. 233.

Crompt.
Jur. 61, 65.

Cr. 10. 41.

Co. super
Lit. 202.
Perk. sect.
242, 243,
843.

Equity.

sue,

sue and his Wife dieth, and Tenant in tail maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, and then the Feoffor doth re-enter; in this case he shall have but an estate for life as tenant in tail after possibility of issue extinct. So if a lessee for life or years make a feoffment in fee on condition, and after doth enter for the condition broken; in this case he shall not be in the same course, for now his estate is subject to entry for forfeiture, though he be tenant for life still. So if a disseisor be of certain land, and he dye seised thereof, and his Heir is in by descent, and the disseisee enter upon the heir, and infeof a stranger upon condition, and the heir of the disseisor doth enter upon the feoffee, and the disseisee doth sue a writ of entry *sur disseisin*, against the heir of the disseisor, and doth recover, and hath execution, and the feoffee on condition doth re-enter, and after the condition is broken; in this case the feoffor is not in the same case, for now the disseisor cannot enter upon him as he might before. And in some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collateral qualities: as if tenant by homage Ancestrel, make a feoffment of the land he doth so hold in fee on condition, and entreth for the condition broken; in this case it shall never be held in homage Ancestrel again. And so if a copyhold escheat be, and the Lord make a feoffment in fee upon condition, and entreth for the condition broken; in this case the custom annexed to that land is gone. So if there be Lord and Tenant by fealty and rent, and the Lord is in seisin of the rent, and granteth his Seignory to another and his heirs on condition, and the tenant doth attorn and payeth his rent to the grantee, the condition is broken; the Lord distraineth for his rent, and rescous is made, in this case the former seisin shall not enable him to have an assise without new seisin. If there be Lord and Tenant, and the Lord disseise the Tenant of the tenancy, and thereof doth infeof a stranger on condition, and after the condition is broken, and the Lord enter, and the Tenant doth enter upon him; in this case the Seignory is not revived.

If tenant in tail make a feoffment in fee on condition, and dieth; and the issue in tail within age doth enter for the condition broken; in this case he shall be in first as tenant in fee simple, and heir to his father, and then shall be presently remitted: but if he be of full age he shall not be remitted.

If one make a feoffment of white acre and black acre, on condition &c. and that he shall enter into black acre only, in this case upon breach of the condition he shall enter into that part only.

If the words of a condition be, That if such a thing be not done, the feoffor or lessor shall enter into the land, and take the profits thereof until the thing be done, or to the like effect; in this case if

Co. super
Lit. 102,
203.

if the Feoffor or Lessor enter upon the breach of the Condition, he doth not avoid the estate, or get any thing by his entry, but the possession onely in the nature of a pledge, or a distress until the thing be done; And if the condition be for the payment of the rent, he shall hold the land untill he be paid the rent. And if the words be [That the Feoffor &c. shall enter and take the profits, until thereof he be satisfied, or until he be satisfied or pay the rent] in the first case as soon as he is paid, either by the receiving of the profits, or payment of the rent behind, or both together; and in the last case as soon as he is paid the rent by the Feoffee or Lessee, the Feoffee or Lessee may enter again into the land.

If a condition be possible in its creation, and after become impossible by the act of God, the condition is discharged and gone forever, and the estate is absolute. As if a feoffment be made to me, on condition that I shall reinfeoff the Feoffor before a day, or on condition that I shall appear at *Westminster* in the Kings Bench such a day, or on condition that I shall go to *Paris* about the affairs of the Feoffor before such a day, and before the day appointed it doth happen that I die; in all these cases the condition is discharged. So if the condition of a feoffment be, That if the Feoffor or his Heirs pay ten pound to the Feoffee such a day, and before that day the Feoffor dieth without heir; in this case the condition is gone. And if the condition become impossible in part onely, then it is discharged for so much onely.

If there be Lord and Tenant, and the Tenant doth infeoff a stranger on condition, and the Feoffee die without heir, so that the tenancy escheat; in this case the condition doth continue, and the Lord must hold it subject to the condition.

Albeit a condition cannot be divided by the act of the parties, but it will be destroyed, yet it may be divided by the act of law; and therefore if a Lease for years be made of two acres of land (the one of the nature of Burrough English, and the other at the Common Law) on condition, and the Lessor having issue two Sons, dieth; in this case, albeit the Condition be divided, yet it is not gone but doth continue still, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reversion, grant part of his reversion to a stranger; the condition is destroyed in all, for it cannot be apportioned by the act of the parties, as it may by the act of the Law, or the wrong of the Lessee.

A condition may be destroyed in the very creation of it; as if one devise lands for life with expresse words of a condition, and not words of limitation, or words that may be so taken, the remainder over to a stranger: in this case the stranger cannot enter, neither is the remainder good, nor the condition effectual. Or it may be discharged by matter *ex post facto*: as in the example following.

15. When and by what means a condition shall be discharged and extinguished for ever, or suspended for a time. Or not. 1. By the act of God. Conditions impossible.

2. By the act of Law.

3. By the act of the parties,

Co. super
Lit. 307.
219. 15H.
7-13.
Dier 263.

Pirk. Sect.
89.

Co. super
Lit. 315.
Co. 4. 120.

Co. 2. 59.
the Lord
Cromwells
case. Dier
309. Co.
super Lit.
265. 379.
Co. 10. 41.

lowing. If one make a feoffment in fee of land upon condition, and after and before the Condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the Land to the Feoffee, or any other; by this the Condition is gone and discharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguish the Condition. And if a fine in this case be levied in pursuance of a former agreement; as if one by Indenture bargain and sell his land to another, and in the Indenture there is a covenant that all other assurances shall be to the use of the Bargainee, according to the first agreement, and the bargain and sale hath a condition annexed that the Bargainee shall make a feoffment of part of the land to the Bargainor, and after the Bargainor doth levy a fine to the Bargainee in corroboration of the first bargain; in this case the Condition is not extinct, but saved by the original agreement. And if one make a feoffment in fee of land upon condition, and after and before the condition broken, he doth make a Lease for years only of the land, or part of it to the Feoffee or any other; by this the Condition is suspended for that time. And if the Feoffor after a feoffment made of land upon condition, enter upon all or part of the land, and be impleaded, and lose it; by this the Condition is gone for ever. And if he enter and hold the possession only; by this the condition is suspended during his possession, and if he hold the possession so long that the Feoffee cannot perform the Condition; the Condition is discharged for ever. And if one make a feoffment of land upon condition, and after and before the Condition broken, the Feoffee doth make a feoffment of all or part of the Land to the Feoffor; by this the Condition is gone for ever. And if the Feoffee make a Lease for life or years onely of part of the land; by this the Condition is suspended for that time. But if the Feoffee make a feoffment in fee, Lease for life or years to a stranger; this is no extinguishment or suspension of the Condition. And if the Condition be to pay money, or do any such collateral thing; if in this case the Feoffee make a Lease to the Feoffor, this doth not suspend the Condition.

Release.

If the Feoffor or Lessor release to the Feoffee or Lessee all Conditions, or all demands in the land, or confirm the estate of the Feoffee without Condition &c. by either of these means the condition is destroyed and gone for ever.

If one make a Lease for life or years of land on condition, and after grant the reversion of part of this land; hereby the Condition is destroyed for ever. And if he make a Lease of part of it onely; by this the Condition is suspended.

A Condition may be extinct or suspended by the intermarriage of the parties to the Condition; as if a feoffment be made by a woman, on condition to pay ten pound, or on condition to infeof her

Co. 2. 59.
Perk. Sed.
819, 820.
163. Lit.
Bro. Sed. 4.
212.
Co. super
Li. 219.

Co. 7. 144
52. Lit.
8 o. Sed.
212. 85.
Co. super
Li. 218.

Perk. Sed.
823, Co. 1.
147. see
Release &
confirma-
tion.
Co. 2. 59.
Perk. Sed.
163, Co. 4.
119.

Perk. Sed.
763, 765,
764.

her by a day certain, and before the day, they two do intermarry, and the marriage doth continue untill after the day; in this case the Condition is gone. And if the Condition be to re-enter for not payment of rent; the Condition shall be suspended, and no rent be paid during the coverture.

Co. 4. 119.
5. 12 2 39.
714.
Dier 319.
If a Lease be made for years, on condition that the Lessee or his assigns shall not alien without the license of the Lessor, and the Lessor for license the Lessee alone to alien, or license him to alien a part of the land, or license him to alien all the land for a time, or if the Lease be to three on such a condition, and the Lessor license one of them to alien; in all these cases the condition is gone for ever.

Perk. Sect.
766.
If one had infeoffed me, on condition that I should pay him ten pound at Easter, and before the time he had entred into Religion, and made me his Executor, and had not been deraigned; in this case the condition had been gone for ever.

Perk. Sect.
812.
If I be seised of land in fee and take a Wife, and during the marriage infeoff a stranger on condition and die, and the Feoffee endow my Wife of her third part; in this case the condition is not destroyed, and yet the third part is freed from the condition, but the reversion of that third part is not freed from the condition. And if the grant her estate again to the Feoffee the condition is revived. So if there be Lord and Tenant, and the Tenant make a feoffment in fee upon condition, and the Feoffee is attainted of felony &c. so that the tenancy doth escheat; in this case the condition is not gone, but the tenancy is charged with it.

Co. 3. 64.
super Lit.
211.
If a feoffment or Lease be made rendering rent, on condition for not payment a re entry, and the Feoffor or Lessor after the breach of the Condition doth distrain or bring an assise for the Rent, or doth accept the rent at another day; hereby the condition is not destroyed, but it is discharged for that time, so that the Feoffor or Lessor cannot take any advantage of that breach: and if the act to be done by the condition be a collateral act, as not to alien, or the like, and the condition is broken, and the Feoffor not having notice thereof doth accept the rent; in this case also, and by this means the condition is not discharged.

Lit. Sect.
476, 477.
Co. super
Lit. 377.
If one disseise the Feoffee, or the Heir of the disseisor or any other that hath lands by a just title, and thereof enseoff a stranger on condition, and the land is lawfully recovered from him by him that hath the title; hereby the condition is destroyed for ever. And if a disseisor make a feoffment in fee on condition; and after the disseisee doth enter upon the Feoffee on condition; this doth extinguish the condition. But if the disseisee release to the feoffee on condition, this release doth not discharge the condition. But if a disseisor make a lease for life, and the lessee for life make a feoffment in fee on condition; and the disseisee release to the feoffee of the Tenant for life, by this

2. By the act
of a stranger.

Release.

the

the condition in law is destroyed. And if the feoffee upon condition make a feoffment over without condition, and the disseisee release to the second feoffee; by this the condition is destroyed, be the release before the condition be broken or after. And if feoffee on condition make a lease for life, and the feoffor release to the feoffee on condition or lessee for life all conditions, or all demands to the land; by this the condition is discharged. And if the feoffee on condition make a feoffment to another on condition, and after the first feoffor doth enter for breach of the condition; hereby the second feoffment and the condition also is gone for ever.

Perk. 802.
823, 821.

If a man seised of land in fee let it to a stranger for years, and one that hath no right doth out the lessee, and thereof dye seised, and his heir is in by descent, and he doth make a feoffment to a stranger upon condition, upon whom the lessee for years doth enter within the term claiming his term; in this case the lessee shall hold the land discharged of the condition.

Perk. 803.
820.

And now we pass to a *Covenant*, being another part of a Deed.

CHAP. VII.

Of a Covenant.

1. Covenant
Quid.

A Covenant is the agreement or consent of two or more by Deed in writing, sealed and delivered, whereby either or one of the parties doth promise to other that something is done already or shall be done afterwards. And he that makes the Covenant is called the Covenantor, and he to whom it is made the Covenantee.

Terms of
the Law
Plow. 304.

Covenantor
Covenantee
2. *Quotuplex.*

And this is either express, or indeed, *i.* when the Covenant is expressed in the Deed: As when *A* by Deed doth covenant with *B* to serve him for a year, and *B* doth covenant with *A* to pay him ten pound for this service. Or it is implied or, in law, *i.* when the Deed doth not express it, but the law doth make and supply it. As when one doth make a Lease for years by the words [demise or grant] without any express Covenant for quiet enjoying; in this case the Law doth intend and make such a Covenant on the part of the lessor, which is, that the Lessee shall quietly hold and enjoy the thing demised against all persons at least having title under the Lessor and at least during the Lessors life, and (as some think) during the whole term. And hereupon an action of Covenant may be brought against him in the reversion, so that if the Heir that is in by descent put out the Termor of his Father, the Termor may have this

Terms of
the Law,
tit. Coven.
Co. 4. 80.
5. 17. F. N.
B 115, 116.
Dier 338.
257.

this action against him. A covenant is also either real, i. that where by a man doth binde himself to pass a real thing, as lands or tenements: as a covenant to levy a fine of land, in which case the land it self is to be recovered, or when it doth run in the realty so with the land that he that hath the one hath or is subject to the other, and so a warranty is called a real covenant. Or it is personal, i. when it doth run in the personality and not with the land, but some person in particular shall have benefit by it, or be charged with it: as when a man doth covenant to do any personal thing, as build or repair a house, serve him, or the like. And these also are some of them said to be inherent, i. such as are conversant about the land, as that the thing demised shall be quietly enjoyed, shall be kept in reparations, shall not be aliened, or if it be to be sold that the lessor shall have the first refusal, to pay rent, not to cut down timber trees, or do waste, to fence the copices when they be new cut, to make further assurance, or the like. And some of them are said to be collateral i. that are conversant about some collateral thing that doth nothing at all, or not so immediately concern the thing granted, as to pay a sum of money in gross, to build a house in another mans ground, to make a feoffment or lease of other land, to give other security to perform the covenants, or to pay the rent, or that the lessor shall distrain for the rent in some other land than that which is demised, or the like: these are collateral covenants. There is also a covenant to stand seised of land to uses, which is now become a kinde of conveyance of land, for which see *Use* at large.

Co. 1. 154.
Lit. Bro.
Sect. 309.
27 H. 8. 16.
Plow. 308.
F. N. B. 135

The most frequent use of a covenant is to binde a man to do something *in futuro*, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee may have thereupon for his relief an action or writ of covenant against the covenantor so often as there is any breach of the covenant. And this writ of covenant is therefore defined to be a writ lying where a man is bound by a covenant in a deed and hath broken it. And in this case commonly the party damnified shall recover damages only for the breach: and if he have a Judgment in an action brought for one breach, and after the covenantor doth break the covenant again, in this case he may bring a new action, and so for every breach. But a covenant doth sometimes also make a transmutation of a property and possession of things, as in case of a covenant to stand seised of lands to uses, for which see *Use*. And in case where one doth covenant that another shall have a piece of land for five years; this is a good lease for five years, for which see *Lease*. And in case where one doth covenant with another, that if he pay him ten pound such a day, he shall have all his cattel in Dale, or his lease for years he hath of the Manor of

3. The use and operation of it.

A writ or action of covenant, *Quid.*

Use.

Lease.

Contract.

Dale; in this case it seems if he pay the money at the time he shall have the property of the goods and of the lease for years. It is said therefore that in some cases upon the writ of covenant, the party shall recover the land it self out of which he hath been ejected.

4. What shall be said a good covenant in deed upon which an Action of Covenant may be had. And what not.

1. In respect of the manner of making it.

A covenant may be in the affirmative, or in the negative. And it may be executed, i. that a thing is done already, or executory, i. that a thing shall be done hereafter, and these are all good. But if it be of a thing present, as if I covenant that my horse is yours; this is void. And these covenants being made by a deed poll are as good and effectual, as when they are made by a deed indented, so as the party have the deed to shew, for otherwise a common person cannot have an action of covenant, for it doth not lie upon a verbal agreement, neither can it be grounded without a writing, except it be by a special custom as in *London*. And there needs not in this case formal and orderly words, as Covenant, Promise, and the like, to make a covenant on which to ground an action of covenant: for a covenant may be had by any other words, and upon any part of an agreement in writing, in what words soever it be set down for any thing to be or not to be done, the party to or with whom the promise or agreement is made may have this action upon the breach of the agreement. And therefore if these words be inserted in a deed amongst other covenants [That the lessee shall repair, provided alwaies that the lessor shall allow timber: Or the lessor shall skowre ditches, provided always that the lessor do carry away the earth] these are good covenants on both sides. And if a lease be made of houses by Patent to *I S*, for twenty one years, and therein is inserted this clause [And that the said *I S* and his assigns shall repair the houses when they shall be decayed;] this is a good covenant. And so also it is where these or the like words be inserted amongst other covenants [And that the lessee shall pay ten shillings a year rent, or that the lessee shall not alien;] these shall be said to be covenants, unless it be in such cases where there is some other means to enforce the doing of the thing. As if in case of the rent there be a clause of distress, re-entry, or *nomine pena*. And in all cases regularly where words that do begin the sentence be conditional; and have the effect of a condition, and do give another remedy, there they shall not be construed to make a covenant, as in the cases of condition before. And yet if words of condition, and words of covenant be coupled together in the same sentence [as Provided always; and it is covenanted, or the like;] in such cases the words may be construed to make a covenant and a condition both.

Break.

If a man make a lease for life by Indenture, and therein are inserted these words [It is provided that if the lessee dye within sixty years,

Plow. 330.
27 H. 8. a
16.

F. N. B.
145. G.
Co. 3. 63.
Ewer's case
8 Jac.

Lit. Bro.
Sect. 450.
Co. 2. Lord
Cromwell
case, Dier
57. 150.
28 H. 7. 37
40 E. 2. 3.

Adridge
pasc. 14.
Jac. B. R.
Sir Thomas
Bret
versus
Cumber-
lands case.

Bro. Cove-
nant 21.
26. & Co.
& Dieruli
supra.

Dier 150.
Co. 1. 155.

years, that then his executors and assigns, shall have the land until the sixty years be ended, to be accounted from the date of the Indenture; This albeit it be not a good lease, yet it is a good covenant.

If a man make a lease for years, and warrant it to the lessee, his heirs, and assigns, during the term, or he that hath right to the land, confirm the estate of the lessee for years with warranty; in these cases howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing.

If the Lord grant to his tenant, that he will not distrain him in such a part of his land for his rent; this shall be taken to be a good covenant, by this word (grant.)

A covenant to do any thing that for the substance & matter of it is lawful, or not to do any thing that for the matter of it is unlawful, is good: as if the grantor covenant that he is seised or possessed of a good estate of and in the thing he doth grant, and hath power to grant it. That the grantee shall quietly enjoy it. That it is and shall be free from incumbrances. That he will make further assurance if need be. That if the grantee be evicted, he shall pay no rent, that the grantee shall pay a rent. That he shall discharge all dues, and save and keep harmless the grantor. That he shall not alien the thing granted; or if he do, that the grantor shall have the first refusal thereof. That he shall not do waste. That he shall have houseboot, hayboot. That the grantor or grantee shall repair the ould housing, or build new. That he shall pay and discharge all rents and payments issuing out of the land. That he shall not sell trees, or if he do, that he shall pay to the grantor so much in money for every tree. That if he sell any underwood, he shall fence it. That he shall make an estate of land. That he shall be quit of any suit, service, or payment. That he shall give sufficient security to I S for an hundred pound he doth owe him; and all these and the like covenants are good. And generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also. But if the matter required to be, or not to be done by the covenant be for the substance thereof unlawful, then is the covenant void and doth not bind: and therefore if one covenant to kill, or rob a man, or the like; this covenant is void. So if one covenant that he will maintain another in his suits, or that he will appear in Inquests, or that he will break the peace, or that he will forestall corn, or the like, these covenants are void. So if one be tenant in fee simple of land, and he covenant that he will not alien it; this covenant is void. So if a man be a tradesman: and he covenant that he will not use or exercise his trade; this restraint if it be absolute and continual, it is void; but if it be *sub modo* only, as that he shall not use his trade at one time, or in one City or Town onely,

2. In respect of the matter or substance of it.

Against Law.

Bro. covenant 38.
descent 50
21 H. 7.
321

Perk. Sect. 69.

See West. Symb. in his first part coto: & infra Plow. 309, 303. 27 H. 3. 16. Dier. 31. 324. 259. 251. Fitz. covenant. 1.

See Condition, Num. 7.
See Conditions against Law, Num. 7.
Dier. 6.

18 Jac. B. R. Jolliffe versus Broad. Pas. 19. Jac. B. R. Tanner versus Brag.

this covenant may be good. So if a man be by covenant restrained to sow the land which hath been used to be sowed, and this be either absolutely, or *sub modo*, i. that if he sow it he shall pay thus much an acre for it; these covenants have been held to be void. *Sed quæ* how the law is now, for it seems the Statute of 39 *Eliz. ch. 9.* is discontinued. If *A* owe money to *B.* and *B* owe money to *C.* and *B* doth make a letter of Attorney to *C.* to sue *A* at his own charge, and *B* doth covenant with *C.* that he will not release the debt to *A*; in this case albeit this be maintenance in *C* to sue at his own charge, yet this is a good covenant and not against law. So also if a Deane and Chapter, or the like, covenant to renew a lease contrary to the meaning of the Statute of 18 *Eliz. ch. 11.* it seems this is a good covenant. And if the thing to be done by a covenant be in the nature of it impossible, the covenant is void. And therefore it is, that if a man covenant to goe to Rome in three days, or the like; the covenant is void. So if a man covenant to make a feoffment to his wife; this covenant is void. But if a man covenant to make a good estate of land to her in fee simple, or otherwise, or to find her maintenance, or to give her so much by the year; these are good covenants. And generally there where the matter being in a condition will make the condition void because it is against Law, there it being in a covenant will make the covenant void.

If a lessor covenant with his lessee, that he shall and may have houseboot, hayboot, plowboot, &c. by the assignment of the Bailiff of the lessor; this is a good covenant: and yet it seems it doth not restrain the power that the lessee hath by the law to take these things without assignment. But if the lessee do covenant that he will not cut any timber, or fuel, without the leave, or without the assignment of the lessor; this is a good covenant and doth restrain him, for in this and such like cases the rule is, *Modus & conventio vincunt legem.*

If an obligee covenant with the obligor, that he will not sue him upon the obligation untill Easter following, this is a good covenant, but no release or suspension of the debt.

If there be Lord and tenant of three acres of land, white acre, and two others, and the Lord grant to the tenant by deed that he will not distrain in white acre for his rent or services; this is a good covenant, but doth not determin the Seignior.

If one man grant a mill within his Manor, and covenant for him and his heirs that there shall be no other mill set up within the Manor; it seems this is a good covenant.

If one make a lease wherein are divers covenants to be performed on the part of the lessee, and after the lessee doth covenant, that if any of the covenants be broken, that the lessor shall enter upon the land demised, and hold it untill the lessee make him amends.

Hil 30 Jac
Co. B.
Maire ver-
sus Stapl-
ton.

Trin 14
Jac. Co. B.
Tailors
case.

27 H. 2.
27. 4 H. 2.
4.

See Condi-
tion Numb
7.

Dier 19.
215.

Mich. 36
37. Eliz.
Co. B. Ad-
judge De-
aux ver-
sus lesse-
ries 21 H.
7 23.
*Perk. sed
69.

Fitz Cove-
nant. 5.

Fitz. Cove-
nant 3.

Impossible.

Release.

amends for the damage done by the breach of the covenant; it seems this is a good covenant, and that the lessor may take advantage thereof accordingly.

Mow. 309.
308.
21 H. 7.
18. 27 H.
8. 16. Plu-
chilly 49.

If a man seised of land in fee, covenant to stand seised of it to uses, and no estate doth rise by the covenant; yet this may be good by way of covenant, and give remedy to the covenantee in an action of covenant. But with this difference. If the covenant be future, as where one doth covenant with another, that in consideration of a marriage his lands shall descend, remain, or revert to his son and heir apparent, and to the heirs of his body on the body of his wife; in this case the covenantee may have a writ of Covenant upon the covenant. For if a covenant be present, as that a man and his heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by the Law in the case; in this case no action of covenant will lie upon this covenant, for this action will never lie upon any covenant, but upon such a covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done, and not when it is for a thing present, as when *A* doth covenant with *B* that his black horse shall be for ever after the horse of *B*; this is no good covenant to give the horse to *B*, or to give him an action of covenant for him, but *A* may keep him still notwithstanding.

Agree. 8.
Car.

If one mortgage upon condition to re-enter upon payment of an hundred pound at a day, and the mortgage doth covenant that he will not take the profits of the land until default of payment; this is a good covenant, and the mortgagee therefore may not meddle with the profits until the day of payment come.

Co. 4. 80.
5. 19. Trin.
3 Jac. B.
R. Sciles.
case. Pas.
7 Jac. B.
R. Winf-
combes
case.

If one make a lease for years of land by the words (*Demise* or *Grant*) and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the Law doth supply a covenant for the quiet enjoying of it against the lessor and all that come in under him by title during the term, and upon this the lessee, his executors, administrators or assigns, may have an action of covenant if he be disturbed. But where there is an express covenant in the deed for the quiet enjoying of the land, there the Law will not make this implied covenant. *Expressum facit cessare tacitum*. And therefore herein this is not like to the case, where a man doth make a lease for life by the words of *Deeds concessi*; or make a lease for life by other words reserving rent, (in which cases the law doth create a warranty against all men during the life of the lessor) for if in these cases there be an express warranty in the deed, yet this doth not take away nor qualify the implied warranty; but the lessee may make use of which of them he will, if he be ousted or evicted by one that hath an elder title.

5. What shall be said a good covenant in law, upon which an action of covenant may be had. And what not.

Warranty.

How a co-
cenant in
the d or law
shall be taken
and expoun-
ded. And how
it shall be per-
formed.

A covenant in particular (being one part of a deed) is subject to the general rules of exposition of all parts of deeds in general, as to be always taken most strongly against the covenantor and most in advantage of the covenantee. 2. To be taken according to the intent of the parties. 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it shall be done in reasonable time, and the like.

How a
See in Ex-
position of
deeds
b: fure in
toto.

Joynt and fe-
veral.

In cases where the covenantees have, or are to have several interests or estates, there when the covenant is made to and with the covenantees, *& cum quo liber eorum, aut altero eorum*; in this case these words make the covenant several, as if one by indenture demise black acre to A, and white acre to B, and green acre to C, and covenant with them and either of them, or covenant with them and every of them; that he is lawful owner of all these acres; in this case the covenant is several; but if he demise to them the three acres together, and covenant in this manner, the covenant is joynt and not several. And if A and B do covenant joyntly and severally; in this case the covenant may be joynt or several; and the covenantors may be sued either the one way or the other, at the election of the covenantee.

Co. 5. 19.
Dier 338.
Bro. Cove-
nant. 49.

For quiet en-
joyning.

If one make a lease of land to another, and covenant that he shall quietly enjoy it without the let of any person whatsoever, or without the let of any person whatsoever claiming by or under the lessor, in both these cases the covenant shall be taken to extend to such persons as have title, or claim some estate under the lessor; for if in the first case any person that hath no title, and in the second case any person that shall claim under another, and hath title, or that shall claim under the lessor, claim or enter, or otherwise disturb the lessee; this is held to be no breach of the covenant. *Sed quere* of the first case, for herein some conceive a difference between a covenant in deed, and a covenant in law; and that howsoever the covenant in law is extended openly to evictions by title, yet that the covenant in deed shall be extended further. And therefore, that if A make a lease for years to B, and doth covenant that B shall quietly enjoy it, during the term, without the interruption of any person or persons; that if a stranger in this case that hath no right doth interrupt B, that he may have an action of covenant: as when such a promise is by word, an action of the case will lie upon it.

F. N. B.
145. 1.
Dier 3. 8.
26 H. 8. 3.
Mich. 7.
Jac. B. R.
accord in
Gambles
case.

Co 4. 80.
Dier 328.
per Furner
at Lent.
Aulize
Glose. 28
Car.

Action of the
case.

And if the lessor covenant with his lessee, that he hath not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case these words [Against all persons] shall refer to the first, and be limited and restrained to any acts done by him, and no breach shall be shown but in such case.

Curia ter-
vis re. fur.
Prede.
Mich. 47.
41 El. B.
R. Co. 4.
17. 22 H.
6. 51 Co.
4. 80. Dier
257.

The covenant in law upon the words Demise or Grant also for the

the quiet enjoying of the thing demised, is general against all persons that have title during the Term, and extendeth to the heir after the death of the lessor, as against himself onely, and shall charge the Executors or Administrators for any disturbance in the life of the covenantor; but not from any disturbance afterwards; he that doth sue therefore upon this covenant, must shew that he was molested or evicted by one that had an elder title.

Executors.

Co. 5. 75.

If one doth covenant to enter into bond for the quiet enjoying of land, and doth not say what bond; in this case it shall be taken to be a bond of so much as the land to be enjoyed is worth.

First Co-
venant. 2.
see before.
7 E. 4. 6.
Bro. Grant
164.

A warranty in a lease for years shall be taken for a covenant for quiet enjoying.

If one covenant with another to acquit him of all charges issuing out of the land, and after by Parliament the tenth part of the value, not of the issues of all lands are given to the King, in this case it seems the covenant shall not extend to this. But if the Parliament had given the tenth part *exitum terre*, the covenant would have extended to this as well as to rents, commons, and such like things, wherewith the land is charged.

To free from
incumbrances
and charges.

Co. 5. 19.

If A covenant with B to make such assurance, or such further assurance of land as the Counsell learned in the law of B shall advise; in this case albeit B be learned in the law himself, yet he may not devise this assurance, but some other learned in the law must advise; otherwise A is not bound to make it.

To make assu-
rances of land.

Co. 5. 19.
20. Dier
361. &
per Just.
Br.ogen an

And if A covenant with B to make such assurance of land by a day; as B or his heires shall devise; in this case B or his heires must first devise the assurance before A is bound to do any thing. And therefore if one sell land for money, and the vendee doth covenant to make back to the vendor and his heires such assurance of the land as the Counsell of the vendor shall devise within one year, provided, that if the vendee make default in the assurance, then if he doe not pay twenty pound to the vendor, that then the vendee shall stand seised to the use of him and his heires, and the vendor tender no assurance, the twenty pound is not paid: in this case the land is in the vendee freed from the covenant. And therefore in these and such like cases, where a man is to make such assurance, as A or his heires, or their counsell shall devise, A or his heires must take care that in time they have an assurance reasonably drawn and ready to be sealed, and to tender it to him that is to seal it, for untill then there can be no breach of covenant. But if A be bound to make a feoffment, lease, or other assurance of land to B by a day; in this case B need not to demand it or tender the assurance, for A at his perill must do it, otherwise he doth break his covenant. And yet if in this case, B doe get the assurance drawn, and tender it to A, it seems A is bound to seal it; or

Thin. 30.
Iac. B. R.
Steed ver-
sus Spike.

entire of
admission

otherwise he doth break his covenant. And if the case be so that *A* is bound to make such assurance to *B*, by a day, at the costs of *B*, in this case *A* must doe the first act, viz. notifie to *B* what manner of assurance he will make, that he may know what money to tender, and when the mony is tendered, *A* must see that he do make the assurance accordingly at his peril, and if he faile in either of these the covenant is broken.

Co. 5. 20.
22.

If *A* be bound to make such assurance to *B*, as by the Counsell learned of *B*, upon request made shall be devised: in this case it is sufficient if the advise be given to *B*, and that he do make it known to *A*, and it is not needful it be given to *A* immediately. And if *A* covenant with *B* to make such assurance to *B* as *I S* shall devise, and *I S* doth devise a reasonable deed of bargain and sale, and he tender it to *A* to seal; in this case *A* is bound to seal it presently, and he shall not have time to advise with his Counsell upon the deed; but if he be illiterate and cannot read the deed, he may refuse and delay to seal it untill he can get some body to read it, which he must doe as soon as he can. And if one be bound by covenant to make an assurance upon request, the covenantee must request and tender an assurance also, and he must tender such a one also as is reasonable, otherwise the covenant will not be broken by the refusal or neglect to doe it: as if one be bound to make a feoffment to *A* upon request; in this case *A* must get a naked deed of feoffment drawn without warranty or covenants, and tender it. And if the covenant be to make such a lease as the former; in this case the second lease must not differ from the former, and if it do, the party is not bound to seal it.

Co. 5. 20.

Dier 338.
Co. 2. 1.Experien-
tia.

If one covenant to levy a fine at the next Assises for thirteen years *extinguish*; this shall be taken from the time of the fine levied, and not from the time of the covenant.

Curia Hil.
Mac Co. B

If one bargain and sell land to me by deed indented, and before the inrolment of the deed I do covenant with *I S* to convey all the land whereof I am seised, and to doe this before such a day, and before the day the deed is inrolled; in this case my covenant shall not extend to this land conveyed to me by this bargain and sale.

Adjudge
in Sir Io.
Brets case.

If *A* covenant with *B*, that in consideration of a marriage between the son of *A* and sister of *B*, that he at the costs of his son, and by his sufficient deed will before Easter day assure land to his son, and *B* doth covenant that if *A* do performe this, then he will make him a general release; in this case albeit *A* be ready, and the son do not tender the assurance, and the conveyance is not made, *B* is not bound to make any release.

Dier 371.

To repaire
the houses.

If one covenant to keep and leave a house in the same or as good plight as it was at the time of the making of the lease; in this case the ordinary and natural decay of it is no breach of the

Fres. Co-
venant 4.

the covenant; but the covenantor is here by bound to doe his best to keep it in the same plight, and therefore to keep it covered &c.

Dier 19. If the words of a covenant be (that the lessee shall have thorns by the assignment of the lessor and necessary fuel also;) it seems by this that there must be an assignment of the fuel as well as of the thorns. For the having of houseboots &c.

Dier 19. 20 If the lessor covenant with his lessee that he shall have sufficient hedgeboot by assignment of the bailiff of the lessor; in this case and by this the lessee is not restrained from that liberty that the law doth give him, and therefore that he might take without assignment: But if the words be negative, that he shall not take without assignment, or that he shall take by assignment, and not otherwise, *contra*.

Trin. 21
Jac. B. R.
George
verius
Lane.

If A doth covenant with B that whereas a marriage is intended to be solemnized between A and C the daughter of B at or before the fourteenth day of August next, and where the said B hath paid to the said A a thousand pound for portion, &c. the said A in consideration thereof doth covenant with B that he within one year of the day of the marriage will assure lands of the value of foure hundred pounds *per Annum*; in this case albeit the marriage be not before that day, yet the covenant must be performed. To convey lands of the value of &c.

Per Justice
Bridgman.

If one make a lease for years of a Manor, and covenant that the lessee shall make estates for life or years, and that they shall be good in this case it seems this covenant shall not be taken to enable the lessee to make estates for a longer time then his estate will beare. That the lessee shall make estates.

Dier 19.

If the lessee covenant with the lessor, that if the lessee be minded to sell his estate, the lessor shall have the first refusal; in this case when the lessee is minded to sell, he need do no more but acquaint the lessor with his purpose, and know his mind, and if he doe not answer him presently he may sell it to whom he will: And if the covenant be further that the lessor shall give as much as another will, the lessee must tell him what another doth offer him, and ask him whether he will give so much, and if he refuse or do not accept it presently, the lessee may sell to whom he will. That if the lessee sell the lessor shall have the first refusal.

Co. super.
Lit. 204.
Dier 37.
Mich. 7.
Jac. Co.

If one covenant to serve me a year, and I covenant to pay him ten pound for it; in this case albeit he do not serve me yet I must pay him ten pound. But if I covenant with him to pay him ten pound if he serve me a year, *contra*, for in this case I am not bound to pay him the money unless he serve me a year. So if one covenant to make new pales so as he may have the old in this case it seems he is not bound to make the new pales unless he may have the old pales. So if one covenant to pay money for service, counsell, or the like, or covenant to marry one daughter, or make an estate, and the covenant be peined with non-payment to

To doe one thing for another

so as one thing is the cause of another, and it is not set down by mutuall and reciprocal covenants, in all these cases if the cause or condition be not observed, the covenant shall not be performed.

That the lessee shall have the fee.

If one make a lease for ten years, and covenant that if the lessee pay him ten pound within the ten years, that he shall have the fee simple, and the lessee surrender his estate within the time, in this case if the lessee pay the money, the lessor is bound to make the fee simple to him. But if the words of the covenant be, that if he pay him ten pound within the term he shall have fee, and the lessee surrender his term, and then pay the ten pound, in this case the lessor is not bound to make the fee simple, for it was not paid within the term.

Co. 1. 134

Assignes.

If one covenant to do a thing to *I S*, or his assigns, or to *I S* and his assigns by a day, and before the day *I S* die, in this case it must be done to his assigns, if he before the day name any assignee, and if he doe not, it must be done to his executor or administrator which is an assignee in law. See more in *Condition Name 8 Obligation 7*.

27 H. 6. 1.

7. When a Covenant in Deed or Law shall be said to be broken And when not And how

That the covenantor is seized of a good estate &c. For quiet enjoying.

If one be seized of land in fee, or possessed of a term of years, and he doth alien it, and supposing he hath a good estate, he doth covenant that he is lawfully seized or possessed, or that he hath a good estate, or that he is able to make such an alienation &c. and in truth he hath not, but some other hath an estate in it before, in this case the covenant is broken as soon as it is made. And if *A* bargain and sell land by deed indented to *B*, and before the deed is inrolled *I* grant the same land to *C*, and covenant that *I* am seized of a good estate of it in fee, and after the deed is inrolled, in this case the covenant is broken.

D'er 103. Co. 9. 60.

Adjudge Sir Petall Brocas case 31. Q.

If *A* let land to *B*, and covenant that he shall quietly enjoy it without the let of any person whatsoever, and *A* himself, or any other person that hath any title to the land by or under him, as if he make a lease of it, or grant a rent out of it to another, or any other person that hath any title to the land, all that be not by or under *A*, as if *A* were a disseisor, and the disseisee do enter or disturb *B*, in all these cases the covenant is broken. And so also is the law deemed to be by some in case of covenant in deed for quiet enjoying, where a stranger or one that hath no title to the land doth enter or disturb *B*. But otherwise it is in case of covenant in law for quiet enjoying, for in this case if a stranger that hath no title to the land doth enter or disturb the lessee, this is no breach of the covenant in law. And in all cases, where any person hath title, the covenant is not broken untill some entry or other actual disturbance be made by him upon his title.

Mic. 8. Jac. Lams case. D'er 334. F. N. B. 145. 26 H. 8. 3. Hil. 39 Eliz. B. R. Cornes case. Fitz. Covenant 26. Broc. Covenant 40.

If a man make a lease of land, and after make a feoffment of

20 Jac. 2. Co. Cove. ant. 6

the same land, and the feoffee doth disturb the lessee, in this case it hath been said, this is a breach of the covenant for quiet enjoying. *Sed quere.*

If a man purchase land to him and his wife, and his heirs in fee, and then make a lease for years of it to *I. S.* and covenant for him his executors and assigns, that the lessee, his executors and assigns shall quietly hold and enjoy the premises without the let of the lessor, his heirs or assigns, or any other person by or through his or their means, title or procurement, and after the lessor doth dye, and his wife doth enter and disturb, in this case and by this means the covenant is broken. And so it is also if *A* purchase land of *B.* To have and to hold to *A* for life, the remainder to *C* the son of *A* in tail, and after *A* doth make a lease of this land to *D* for years, and doth covenant for the quiet enjoying, as in the last case, and then he dyeth, and then *C* doth oust the lessee; in this case this was held to be no breach of the covenant. So likewise if *A* be seised of white acre in fee, and take to wife *B.* and then make a lease of it to *C* with such a covenant as before for the quiet enjoying, and then *A* doth dye, and after *B* doth recover dower, by this the covenant is broken, and yet if the mother of *A* recover dower, and oust the lessee, *contra.* So also if a tenant in tail doth make a lease with such a covenant, and his issue doth disturb the lessee, this is no breach of the covenant. And yet if the lessor be the cause of the gift in tail, or procure the disturbance, this may be a breach of the covenant. And so also it is where a man is seised of land in fee, and he doth make a lease with such a covenant, and afterwards he doth dye, and then his heir is in ward by reason of a tenure, and hereby the lessee is disturbed; it seems this is no breach of this covenant.

If one covenant that the wife he is about to marry, shall quietly enjoy all her goods, and that the covenantee shall take it into his possession, and the husband doth onely take the goods and keep them in his possession, this is no breach of the covenant.

If a covenant be for the quiet enjoying against all persons but the King and his successors, and the Patentee of the King do disturb, this is a breach of this covenant.

If two make a lease, and covenant that the lessee shall enjoy the land without the let of them or any other, and one of them alone doth disturb the lessee, this is a breach of the covenant.

If a lessee grant and assign all the land contained in his lease to *A.* and doth covenant with him that he hath nor done any act or thing by which the grant or assignment might be impaired, but that the assignee, his executors, &c. may enjoy it against all persons, and before this time the wife of the lessor had recovered and had execution of a third part of this land for her dower, in this case this

Hil 20
Jac. ad-
ridge B.
R. Butler
verius L.
dy Swi-
ngton.

Swans
case M.
& 9 EL.

Dier. 52.
26 H. 8. 5.
Fitz. Co-
venant 6.
24.

Curia B.
R. p. 106
Car.
Crowles
case.

Adjudge
Hil 23 El.
Wood-
106 ver-
ses Green-
wood Ad-
judge
Mich. 9
Car. B. R.
Sanders
case. Dier
240.

West 101 of
the records
of the Court of
Commons

3d Edm. 1
1066

If *A* breach of this covenant, for the words [but that &c.] do refer to the former and are not absolute.

If *A* grant the Bailiwick of *W* to *B* for life, and *A* assign it to *C* for three years, and after to *D*, and *C* doth covenant with *D* that he will not do or suffer to be done any act during the said three years by which the grant made by *A* may be forfeit, but that after the three years ended he may enjoy it in as ample manner as *C* did or might have done without any act by *C*, and after the three years ended *C* doth execute a Process there, and thereby intrench upon the office; this is no breach of the covenant.

Adjudge
Rich. ver.
su. Row.
pasc. 11
Jac. Co. B.

To free from
charges and
incumbrances

If *A* grant land to *B* and his heirs rendering ten pound rent, and *B* doth sell the land to *C* and his heirs and doth covenant with *C* that from such a day he shall enjoy it discharged of all incumbrances, and before that day a Common Recovery is had against *C* in which *A* is vouched; and this is to the use of *C* and his heirs supposing hereby the rent had been gone which is not so; in this case the covenant is broken, for this rent is an incumbrance.

Curia R. R.
30. Jac.
Co. B.
Greenway
and Tuck-
folds case.

If a lease be made of land for years, and the lessee devise it to his wife *durante viduitate*, and after to his son, and he in reversion doth sell the fee to the woman during the widowhood, and doth covenant that the land is discharged of all former sales, rights, titles, charges; in this case the covenant is broken at the first by reason of the possibility of the son.

Co. 10. 51.

If *A* grant white acre to *B*, and covenant that *B* shall enjoy it against all incumbrances, and *C* doth disturb him in the taking of common there, and this is a common which is against common right and which he hath by prescription; in this case it seems this is a breach of the covenant. But if it be of a common that is of common right, *contra*.

9 Eli. Co.
B.

To make e-
states and as-
surances.

If *A* covenant with *B* before Easter to make him a good sure estate of land discharged of all former bargains, leases and incumbrances whatsoever (leases or grants for life or years reserving the ancient rent during the term only excepted) and *A* after this and before the estate made doth make a grant of all or part of the land reserving the old rent, it seems this is no breach of the covenant.

Dist. 129

If one make a lease to *J* for years, and covenant with him that upon the Surrender of that lease he will make him a new lease, and the lessor before *J* can make any Surrender doth sell away the reversion, or make a lease to another of the land, and so disable himself, this *per se* is a breach of the covenant, without any Surrender made by the lessee which in this case is not lawful. For *Lex animarum coram deo est in nulla praeiudicium*. So if one be leased of land in fee, and covenant to make a leasement of it to *J* for years by

Co. 5. 11

a day upon request, and the Covenantor before the day doth make a feoffment of it to another, and then doth die before any request made to him; in this case the covenant is broken.

Dier 338.
Co. 2. 13. If *A* covenant with *B* to make such assurance as *B*, or as the Counsel learned of *B* shall devise, and *B* tender such an assurance to *A* to seale, and *A* doth refuse or delay to seale it; this is a breach of the covenant.

Bro. Covenant 3. If *A* doth covenant with *B*, *C*, *D* and *E* to make them a feoffment such a day, and they come to the land at the time to take it, and *A* doth not make the feoffment; by this the covenant is broken. And so also if *B* and *C* only or one, of them doth come to the land, for it may be made to any of them in the name of the rest. But if none of them come to the land albeit the feoffor never come there it seems the covenant is not broken.

Curia B. R. If *A* covenant with *B* before Easter next to assure his house to him and *K* his wife during the life of *IS*, and *A* surrender his house to the use of *B* and such as *K* shall name at the request of *B*; in this case the covenant is broken, for this is no performance of it.

Dier 334. If one covenant to reparaire, sustain and amend a house, and the house is burnt by the negligence of the covenantor and not repaired again; this is a breach of this covenant. And if the lessee covenant for him and his executors to reparaire at his own costs (the principall timber not hurt or in decay for lack of reparations or otherwise in default of the lessee or his executors only except) and he die, and afterwards the house is burnt in default of the executors; in this case the covenant is broken and the executors may be charged. To Repaire..

Fitz. Cove nant 39.
Co. 5. 15.
F. N. B. 145.
Co. 1. 98.
Perk. sed. 738.
Dier 33.
Plow. 229.
40 E. 3. 5. If one covenant to leave a wood in the same plight he findes it, and he cut down trees; in this case the covenant is broken presently, for it is now become impossible to be performed by his own act: But if in this case some of the trees be blowed down with the wind, or the like, by this the covenant is not broken, for it is now become impossible to be done by the act of God, and in this case the covenantor is not bound to supply it. And so likewise of a covenant to reparaire houses; or if one covenant to sustain houses or Sea banks, or covenant to leave them in as good case as one doth find them, and the houses be burnt, or thrown down by tempest, or the like, or the banks be overthrown by a suddain flood, or the like accident; in this case the covenant is not broken by this accident only. but if the covenantor do not reparaire and make up these things again in time convenient the covenant will be broken. And if houses be let to me for years and I covenant to leave them in as good plight as I find them, and I throw down the houses, this is no breach of the covenant, for I may reedifie them, and

and therefore no action will lie upon this covenant until the end of the term.

If one covenant to repair a house before a day, and it happen the plague is in the house before and until the day; and thereby it is not done; in this case the covenant is not broken, for this will excuse, but then it must be done in convenient time afterwards, for otherwise the covenant will be broken.

Hil. 8 Jac.
Curia.

If a lessee covenant to do all the reparations of a house demised at his own costs and charges, and he cut trees upon some of the ground demised to amend the the house; it seems this is a breach of his covenant.

Dier 198.

To pay money. If one covenant to pay money at five several daies, and he faile of payment the first day; by this the covenant is broken.

Co. super
Lit. 292.

To leave a
stock &c.

If one take land sowed or a stock of Cattel in lease for years, and the lessee covenant to leave it in as good plight as he doth take it; in this case he must leave it sowed again, and if any of the cattell die, he must make up the number, otherwise he doth break his covenant.

40 E. 3. 5.

Not to take
toll.

If a Corporation do covenant not to take Toll, and their Common officer appointed for that purpose doth take it; this is a breach of the covenant.

43 E. 3. 17.

To build a
house.

If A covenant with B to build a house by a day, and B doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this case the covenant is broken, for this will not excuse him; But if he do by an actuall impediment hinder him, or be the cause why the thing is not done, then the not doing of it is no breach of covenant. And therefore if a lessee covenant to clesne one of the ditches in the land demised, and the lessor enter upon the land it self and keep out the lessee, and he doth not clesne the ditch by the time; by this the covenant is broken: but if in this case the lessor do by force keep the lessee out of the ditch or place it self, *contra*.

18 E. 4. 8.
Kelw. 34.
Frim.
36 El. B.
R. Carrell
versus
Reade.

To clesne a
ditch.

To have liberty
to go in
and out of a
shop.

If A and B be Joyntenants of a shop, and A covenant with B that he and his assignes shall have free ingresse and egress in and out of the shop, and A doth appoint C his servant to enter as servant to him and to occupy in common with A, and this servant doth excell the servant of B; in this case this is a breach of the covenant.

Hil. 16 Jac.
B. R. Sili-
ard ver-
sus Loc.

To come into
a house.

If A covenant with B that B shall come foure times a year into the house of A without being ousted by A, and A when he doth see B coming doth shut the doores and windows and doth not suffer B to come in; by this the covenant is not broken.

3 H. 4. 8.

To marry a-
nother, Make
a feoffment
&c.

Tender and
refusall.

* If A covenant with B to marry the daughter of A, make a feoffment, or do any other act to C (who is a stranger to the covenant) and A doth tender it and offer to do as much as C doth require.

33 H. 6.
6 Bro.
Covenant
112
62.

in his power; but the stranger doth refuse it, and thereby it is not done; yet this doth not excuse but the covenant is broken. But if the covenant be to do any such act to the covenantee himself, and the covenantor tender it, and the covenantee refuse it; by this the covenant is performed.

See more in the last question and in *Obligation Numb. 7, 8, 9, and in Condition Numb. 9, 10.*

Any one that is party to the deed to whom the covenant is made may take advantage of the covenant, but not a stranger: for if *A* covenant with *B* to do an act to *C* who is no party to the deed; and he doth it not, *B* and not *C* must sue him upon this breach.

If a lease be made of land to a husband and wife for years, and the lessor doth enter upon the land and put them both out, or the one of them after the death of the other, in this case both of them whilst they both live; and the survivor after the death of one of them may have this action of covenant upon the covenant in law. So if a wardship be granted to a woman by deed, and she take a husband and dye; the husband shall have advantage of this covenant in law made by the word [grant] if he be disturbed. So if one by the words [demise or grant] lease land to a woman sole for years, who taketh a husband and dyeth; in this case if the husband be disturbed he shall take advantage of this covenant in law.

If a feoffment be made in fee, and the feoffor doth covenant to warrant the land; or otherwise to the feoffee and his heirs; in this case the heir of the feoffee shall take advantage of this. As if *A* covenant with *B* and his heirs to infeoff *B* and his heirs of land, and *B* dye before it be done, in this case his heirs shall take advantage thereof. And if *A*, *B* and *C* have lands in coparcenery, and they purchase other lands in fee, and they covenant each to other his heirs and assigns to make such conveyance to the heir of him that shall dye first of a third part as he shall devise, in this case the heir not the executor shall take advantage of the covenant.

Executors and Administrators shall take advantage of inherent covenants, albeit they be named. And therefore if *A* covenant to do a thing to *B*, and do not name his executors or administrators, and it be not done, it seems the executors or administrators of *B* may have an action of covenant for the not doing of it. As if one covenant with *I* to pay him money at Michaelmas, and do not pay to his executors &c. and he dye before the time; in this case his executor or administrator shall take advantage of this covenant and may recover the money.

* Grantees of reversions shall have the like advantage against Fermors (by action only) for any covenant or agreement contained

8. Who shall or may have advantage of a covenant in deed or law, and bring a writ of covenant upon the breach of it. Or not.

Heir.

Executors & Administrators.

Assignees of Grantees.

Mich. 7.
Jac. Co. B.

Co. 5. 17.
Dier 257.
47 E. 3. 12.

Dier 338.

Co. 5. 17.
F. N. B.
145. H.
Dier 112.
271.

* See Condition Numb. 12.
Co. 5. 18.
9 Jac. B. R.
Wilborn and Best-
wicks case
accord.

in.

in their lease as the lessors their heirs or successors might. And so also shall lessees against grantees of reversions (recoveries in value except) by the statute of 32 H. 8. cap. 34. And herein (as in the cases of a condition before) a difference is taken between covenants that are inherent, and covenants that are collateral. For the covenants whereof grantees by this statute shall take advantage are inherent covenants, *i. e.* such covenants as do concern the thing granted, and tend to the supportation of it: As where a lessee for life or years doth covenant with his lessor and his heirs to keep the houses demised in good reparations, or the like, and after the lessor doth grant away the reversion of all * or part of the houses to *IS*; in this case *IS* shall take advantage for any breach of the covenant in his time, but not for any breach before the time the reversion is granted. But if the lessee doth covenant with his lessor and his heirs to pay him a sum of moneys, or make him a feoffment on the like, and then the lessor doth grant the reversion to *IS*; in this case *IS* shall not take advantage of this covenant: And yet the executors or administrators of the lessor shall take advantage of this covenant.

* Mich.
8 Jac.
Pines case

Regularly every assignee of the land or thing demised shall take advantage of inherent covenants, as if a covenant be, to have Estovers to burn in the house demised, or to have timber to repair, or if the covenant be that the lessor or lessee shall repair, or the like. And therefore of these assignees in deed and in law, assignees of assignees *in infinitum* shall take advantage; and assignees of executors or administrators, Tenants by Statute, or Elegit, or after a sale upon a *Fieri facias*, a husband in the right of his wife, any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named yet may he take advantage of it.

Co. 5. 17.

If a lease for years be made to *IS* by the words [Demise or Grant] and the lessee assign this over to *ID*; in this case *ID* may take advantage of the covenant in law, and bring an action against the lessor if he be disturbed.

Co. 4. 80.
Dier 259.
Fitz. covenant 30.

If a lease for years be made of land, and the lessor doth covenant with the lessee and his assigns to do or not to do something; in this case an assignee by word or an assignee by deed may take advantage of this covenant.

Co. 2. 62.
F. N. B.
145.

If two coparceners make Partition of land, and the one of them doth covenant with the other to acquit her and her heirs of a suit that issued out of the land, and the covenantee doth alien her part to a stranger; in this case the alienee shall have the same advantage for acquittal of the land as the covenantee had. So if *A* be seised of the Manor of *B* whereof a Chappel is parcel, and *x* Prior with the consent of his covent had covenanted with *A* and his heirs

Co. Super
Lit. 385.
Co. 5. 23.
18.

Lords

Lords of the Manor to celebrate Divine Service in the Chappel. And after *A* had sold the Manor, in this case the Vendee or Assignee of the Manor, should have had the same advantage of the Covenant the Vendor had. But if the Lord had sold the Chappel, the Assignee of the Chappel should not take advantage of the Covenant. And if the Covenant be to say Divine Service in the Chappel of a stranger, in this case the Assignee of the Manor in which the Chappel is, shall not take advantage of the Covenant.

Regularly all those that do seal and deliver the Deed, and are named and bound by the express words of the Covenant, whether the Covenant be collateral or inherent, are bound by the Covenant contained in the Deed. And therefore if Heirs, Executors, Administrators or Assigns be named in the Covenant, for the most part they are bound by the Covenant. And in all cases of inherent Covenants also, where a man doth covenant for himself onely, and doth not name his Executors and Administrators or either of them, they are bound and may be charged by the Covenant, notwithstanding. And in some cases the Law is so also for collateral Covenants. And in most cases of inherent Covenants that tend to the support of the thing granted; (in respect of which it is presumed the Lessor took the Lessee for the land) such as have the land, albeit they be neither Executors nor Administrators or either of them, but Assignees, &c. shall be charged by the Covenant though they be not named, for these Covenants are said to run with the land.

If a feoffment, or Lease be made to two, or to a man and his Wife, and there are diverse Covenants in the Deed to be performed on the part of the Feoffees or Lessees, and one of them doth not seal, or the Wife doth, or doth not seal during the coverture, and he, or she that doth not seal doth notwithstanding accept of the estate, and occupy the lands conveyed or demised, in these cases as touching all inherent Covenants, as for payment of rent, and the accessaries thereof, as clauses of distress, of re-entry, of *nomine pene*, reparations, and the like, they are bound by these Covenants as much as if they do seal the Deed. So if a Lease be made to *A* for years, or life, the remainder to *I. S.* in fee, and there is a rent reserved, or there be divers Covenants on the parts of the Grantees, and *I. S.* doth never seal the Deed or Counterpart; yet if in this case he accept the estate after the death of *A*, he must pay the rent, and perform all the Covenants that are inherent. So also if there be Covenants in the Kings Patent to be performed on the part of the Patentee: As if there be this clause in the Patent [and that *I. S.* (the Patentee) shall repair the house when it is decayed;] in this case the Patentee is bound by this Covenant, and all such like Covenants. But *Quere* of collateral Covenants in the first cases, for therein it seems the Feoffee or Lessee is not bound. And yet it is said, that if an Indenture

9. What shall be bound and charged by a Covenant. And against whom a Writ of Covenant doth lie. And where. Or not.

Executors. Administrators.

Co. s. 16.
A7. s. 18.

Co. super
Lit. 23.
Dier 13.
Bro. cove.
nant 6.
Det. 18.

Experien-
tia Pale.
4 Ja B.R.
Bret. &
Cumler-
lands case.

Co. super
Lit. 231.

be made between *A.* of the one part and *B.* and *C.* of the other part, and therein there is a lease made by *A.* to *B.* and *C.* on certain conditions, and *B.* and *C.* are bound to *A.* by the Indenture in twenty pound to perform the conditions, and *B.* onely doth seal the Deed and not *C.*; yet in this case if *C.* accept of the estate, he is bound by the Covenants, and one of them cannot be sued without the other whiles they are both living. *Qui sentit commodum sentire debet & onus. Et transit terra cum onere.*

Heir.

If a man covenant for him and his heirs to do any thing whatsoever; hereby his heirs are bound. But otherwise except the heirs be bound by the Deed by expresse name, an heir shall scarcely be bound or charged in any case by a Deed. And therefore it is that if the Lessee for years be ousted by any other but the heir himself, no action of covenant will lie against the heir, unless there be an expresse Covenant wherein and whereby the Lessor and his heirs are bound. But if he be ousted by the heir himself, it seems an action of Covenant will lie against him. And yet if he be ousted by an elder title from the Lessor, *contra*, for in this case the heir shall not be charged.

Co. 5. 17.
Bro. covenant 32.
32 H. 6. 32.
Dier 257.
Fitz. covenant 31.

Executors.
Administrators.

If a man do covenant for himself onely, to pay money, build a house, or quiet enjoying, for the like, and he doth not say in the Covenant [his Executors Descend Administrators, &c.] yet hereby his Executors and Administrators are bound and shall be charged. And yet if a lessee for years covenant for himself to repair the houses demised, omitting other words; it seems in this case he is bound to repair only during his life, and the Executors or Administrators are not bound. So if a Lessor covenant for himself only to discharge the Lessee of all quit rents out of the land; it seems this covenant is only personal; and shall bind the Covenantor only during his life. But if in these cases these words [during the term] be added in the covenant, as if a Lessee covenant for himself to repair the houses during the term, or the Lessor covenant for himself to discharge the Lessee of all quit rents during the term; in these cases it seems the Executors and Administrators also will be charged after his death.

10 H. 7. 13.
Dier 19.
14. Bro. covenant.
50. Dier.
274.

If a Lessee be ousted by one that hath title; it seems an action of Covenant will lie for this ouster against the Executor or Administrator upon the Covenant in Law, if he were put out in the life time of the Lessor and not otherwise, for if there be Tenant for life, remainder in fee to another, and the Tenant for life by the words [demise or grant] doth make Lease for years and die, and after he in the remainder doth enter and put out the Lessee for years; in this case he cannot upon this Covenant in Law charge the Executors or Administrators of the Lessor. But upon an expresse Covenant for quiet enjoying he may.

Dier 257.

Assigns or
Grantees.

In some cases an Assignee shall be charged though he be not

Co. 5. 16.
mied,

med, and in some cases shall not be charged though he be named, and in some cases he shall be charged when he is named, as when the Covenant doth extend to a thing in *esse*, parcel of the demise, there the thing to be done is appurtenant and *quodammodo* annexed to the thing, and shall binde the Assignee though he be not expressly named, as a Covenant to repair, &c. But if the Covenant be annexed to a thing not in *esse* before, but *de novo* to be erected on the thing, as to set up a new house, or the like; in this case it will not binde the Assignees unless they be named in the Covenant. And if the Covenant be to do a thing meerly collateral; in that case it will not binde the Assignees albeit they be named expressly. Also when a contract is personal onely, and a man doth binde himself and his Assigns; his Assigns shall not be bound hereby: as if one demise sheep or other flock of cattel, or any other personal goods for any time, and the Lessee doth covenant for him and his Assigns at the end of the term to deliver them in as good plight as they were at the time of the demise, or such a price for them, and the Lessee assign them; in this case this Covenant will not bind the Assignee: But the Executors and Administrators of the first Lessee are bound hereby. So if one demise a house and land with a stock or sum of money for years, rendring rent, and the Lessee doth covenant for him and his Assigns to deliver the money at the end of the term; in this case an Assignee shall not be bound by this Covenant as the Executors and Administrators of the Lessee shall.

Executors.

Co. 5. 17.
Dier 17.
Bro. de-
scend. 50.

If a Lessee covenant to repair the houses demised, or to discharge the Lessor *de omnibus oneribus circa terram*, or the like; in these cases and such like, albeit Assignees be not named in the Covenant, yet Assignees and Assignees of Assignees *in infinitum*, and all others that shall come to the land by the act of law, or by the act of the parties shall be bound and charged by this Covenant.

Co. 5. 17.

If a Lessee covenant for him and his Assigns to build a new house upon the land demised within seven years, and the Lessee assign it over; in this case the Assignee is chargeable. But if a man covenant for him and his Assigns to make a feoffment, obligation, or the like, in this case the Assignee shall not be charged albeit he be named. And if the Lessee covenant for himself, or for himself, his Executors and Administrators only to build a new house upon the land demised, and the Lessee assign over the land; and in this case the Assignee is not bound by this Covenant.

This case
v. Cholm-
ley. Trin.
36. Eliz.
Cb.

If a Lease be made rendring rent, and if it be agreed that the Lessee his Executors and Assigns shall forfeit three shillings four pence *nomine pena* and the Lessee assign the term; in this case it seems the Assignee shall be charged with the *nomine pena*.

Note.

And in all the cases before where a covenant is broken, an action of covenant may be brought. But herein is ite that howsoever in divers of the cases before Assignees are chargeable upon a Covenant, yet the Lessee himself is not hereby discharged, but the Lessor or Grantee of the reversion hath election to charge which of them he will. And therefore if a Lessee covenant for him and his Assigns to repair, and the Lessee assign, in this case the Lessor may have his action of Covenant against either of them. And if a Lessee covenant for him, his Executors, Administrators and Assigns to repair the houses demise, and he in reversion doth grant away his reversion, and the Lessee assign his estate; in this case albeit the Grantee of the reversion have accepted the rent of the assignee of the term, yet he may still have an Action of Covenant against the Executor of the Lessee upon this covenant. So if a Patentee covenant for him and his assigns to repair, and he assign, the King may have his action against either of them.

Bro-covenant 32.

Election.

Hil. 16.
Jac. B. R.
Curia Bret
vers. Cumberland.

If A. and B. do covenant for themselves jointly without more words, the Covenant is joint, and one of them cannot be charged without the other. But if they covenant for themselves severally, the Covenant is several, and they may be sued apart. And if they covenant jointly and severally, then the Covenant is joint and several, and they may be sued either way at the election of the Covenantor.

Co. 5. 23.

10. When a covenant shall be said to be gone and discharged. And when not. And how.

Where the Deed it self wherein the Covenants are contained, or the estate on which the Covenants as accessory to the principal doth depend, is gone and determined, there regularly the Covenants are gone also. And therefore if a Lease for life or years be surrendered, whereby the estate is gone, of a Deed become void by failure or the like, and there be Covenants contained in the Deed; by these means the Covenants are gone also. But this surrender doth not discharge the breach of Covenant which was before the surrender. For if a Parson lease his glebe for years, and after resign, whereby the Lease for years doth become void, in this case the Covenants of the Lease as to the time before the resignation shall be said to be in force still.

Dier 30.
Co. 123.40 E. 1. 27
Br. surren.
47. coven.
42 Hil. 4.
Jac. B. R.
Moile ver.
Austin.

Where a Covenant is become impossible to be done by the act of God, as where one doth covenant to serve another seven years, and he die before the seven years be expired, by this the Covenant is discharged.

Co. 1. 98.
Flow. 25.

Where there is an express Covenant in a Deed for quiet enjoying, the implied Covenant is gone. *Expressum facit cessare tacitum.*

Co. 2. 30.

By a release of all Covenants from the Covenantor, the Covenant is discharged, so as the release be by Deed; for a Covenant by Deed

cannot

cannot be discharged by word. And therefore if *A* by Deed covenant with *B* to build a house by a day, and *B* doth wish him to let it alone; this is no discharge of the Covenant.

p. 66. Car
B. R. Ad-
judge Ba-
cheors
sale.

If the Lessor accept the rent of the Lessee or his Assignee after a Covenant broken; this doth not discharge the breach of the Covenant, but the Lessor may sue for it notwithstanding.

And so we come to a *Warranty* being a special kind of Covenant, and therefore next in order to be spoken to.

CHAP. VIII.

Of a Warranty.

Finchley
89.
Co. super
Lit. 365.

A Warranty is a Covenant real annexed to lands or tenements whereby a man and his heirs are bound to warrant the same. Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this Warranty, is called the *Warrantor*, and he to whom it is made, the *Warrantee*.

1. Warranty.
Reid.

Warrantor.
Warrantee.

Co. 1, 2.
Super. Lit.
365, 4, 5.

There are two kinds of Warranties. 1. A Warranty in deed, or an express Warranty, which is when the same is expressed; as when a Fine or Feoffment by Deed is levied or made in fee, or a Lease for life is made by Deed, comprehending Warranty, or which hath an express clause of warranty contained in it, as when a Conuſor, Feoffor or Lessor doth covenant to warrant the land to the Conuſee, Feoffee or Lessee, which is in these words. *Eg. L.S. & heredes mei warrantia habimus & imperpetuum defendimus W.S. & heradibus suis et successoribus predictis contra omnes homines imperpetuum.* And by the Statute of *Bigamis Deed* it made an express Warranty during the life of Feoffor. 2. A Warranty in law, or an implied Warranty, which is when it is not expressed by the party, but tacite made and implied by the Law, whereof see divers Examples *infra*. The Warranty in Deed also, is either lineal, which is thus described. A Covenant real annexed to the land by him which either was owner or might have inherited the land and from whom his heir lineal or collateral might by possibility have claimed the land as heir from him that made the Warranty. Or else it is collateral, which is thus described. A Warranty made by him that had no right or possibility of right to the land, and is collateral to the title of the land. Also there is a Warranty which doth commence by disseisin or wrong; of all which see divers Examples

2. Quomplex.

Co. super
Lit. 383.
384-370.
365.

ample afterwards. And note that all these things here are to be applied to Warranties of lands and concerning free-holds and inheritances, for there is a Warranty of goods and cattels in contracts of which we treat not here.

3. The fruit and effect of it, and what use may be made of it.

The fruit and effect of this Warranty in Deed is, that it doth always conclude and bar the Warrantor himself of the land so warranted for ever, so that all his present and future rights that he hath or may have therein, are hereby extinct. And therefore if the Father be disseised, and the Son in his life time release all his right to the land to the disseisor, and make a warranty of the land in the Deed, and then the Father dieth, and the right of the land descendeth to the Son; in this case albeit the Release doth not bar the Son, yet the Warranty doth bar him. And for the most part also it doth conclude and bar the Heirs of him that made the Warranty to whom the same Warranty doth descend to demand the same land against the Warranty, for if it be a lineal Warranty, it is a bar of an estate in fee simple without any Assets, i. e. without any other land descended to him in fee simple from the same Ancestor that made the Warranty. And with Assets it is a bar of an estate in tail. And if it be a collateral Warranty, it is with or without Assets a bar of an estate in fee simple or fee tail, and all possibility of right thereunto; and yet so as it doth not pass any estate or right, but onely binde the right so long as the Warranty is in force, for if the Warranty be avoided, the right may be revived. But neither the lineal or collateral Warranty can enlarge an estate. And therefore if a Lessor by Deed release to his Lessee for life, and warrant the land to him and his Heirs, this doth not make his estate greater, neither will it bar titles of entry or action in case of Mortmain, consent to a Ravisher, Mortgage or Dower. And therefore if an Ancestor of the Lord hath title to enter upon a Rationation in Mortmain, and he release and make a Feoffment with Warranty, this Warranty will neither bar him nor his Heir. So if a collateral Ancestor will make a Warranty which doth after release upon one that hath title of entry upon a condition broken, this will not bar his entry, neither will it bar any right that shall commence after the Warranty made. And the Warranty that doth commence by disseisin doth not binde or bar any estate with or without Assets.

And in cases where the lineal or collateral Warranty is a bar, there if the party be impleaded by him or his Heirs that made the Warranty, the party impleaded that is Tenant of the land may plead and shew forth this Warranty against him, and demand judgement whether he contrary to his own Warranty shall be suffered to be received to demand the thing warranted; and this in pleading is called a rebuttal. And if he be impleaded by a third party for the

Co. super
Lit. 265.
372, 365.
184.
Co. 4. 121.
80. 97.

Co. super
Lit. 265.
&c.

Co super
Lit. 265.
Co. 10. 98.
99.
Dier 42.
Co. super
Lit. 101.

Rebuttal.
And.

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the

the land; then he to whom the Warranty is made or his Heirs may vouch, i. e. call in the Warrantor or his Heirs to warrant the land. And this is an interpleader in the nature of an action brought by the Warrantor against the Warrantee wherein he that doth vouch, (cal'd the Voucher) is Demandant, and he that is vouched (called the Vouchee) is made Tenant or Defendant to the action, and the Voucher is as it were out of the suit. And this second Tenant the Vouchee is called the Tenant by the Warranty. And hereupon shall issue forth to the Sheriff a Writ to summon the Vouchee to appear called a *Summons ad warrantandum*. And if the Vouchee appear he must plead to the Voucher, and if he shew cause why he should not warrant, that must be tried, and this shewing of cause is called a Counterplea to the Voucher, but if he plead in avoidance of the Warranty, it is called a Counterplea to the Warranty: And if he cannot gainsay the Warranty, the stranger shall recover the land demanded against the Voucher, and he shall recover as much other land against the Vouchee of the lands he hath or had at the time of the Voucher. And this recovery of other land is called a Recovery in value. And if the Vouchee hath at the time of the Voucher and recovery, no lands descended to him to answer the VVarranty, but hath afterwards lands happening to him by descent from that Ancestor, then he may have a resummons and recover the land that doth after happen. But if the Sheriff return upon the summons, that the Vouchee is summoned, and he doth make default, then he shall have a *Magnum cape ad valentiam*, when if he make default again the Judgement shall be given against the Voucher, and he shall recover over the value against the Vouchee, and if the Vouchee appear, and then make default, the Voucher shall have a *Parvum cape ad valentiam*, and then if he make default, Judgement shall be given as before. But if the Sheriff return upon the summons he hath nothing whereby he may be summoned, then may the Voucher have a Writ called *Sequatur sub suo periculo*, whereupon shall go an *Alia* and *Pluries*, and if the like return be made, the demandant shall have Judgement against the first Tenant, but he cannot recover in value against the Vouchee. And if the case be so, the Vouchee had a Warranty from some other for the land, he may dearraign, i. e. maintain the VVarranty over, and shall recover in value over also against his Voucher in the same manner as before.

Voucher.
Quid.

Voucher.
Vouchee.

Tenant by the
Warranty.
Quid.

Summons ad
warrantan-
dum. Quid.

Counterplea
to the Voucher
Quid.

Counterplea
to the war-
ranty. Quid.

Recovery in
value. Quid.

Sequatur sub
suo periculo.
Quid.

Dearraignment
del Garrant.
Quid.

Warrantia
Charta. Quid.

F. N. B.
134.
Co. super
Lit. 102.

Or the VVarrantee to whom the Warranty is made, or his heirs, may at any time before they be impleaded for the land, if they will bring a *Warrantia Charta* upon the VVarranty in the Deed against the VVarrantor or his Heirs, and hereby all the land the Heir of the VVarrantor hath by descent from the Ancestor that made the VVarranty at the time of this VVrit brought shall

be bound and charged with the Warranty into whose hands soever it go afterwards; so if the land warranted be after recovered from the Warrantee, he shall recover so much land over again of the other land of the heir of the Warrantor, or of the Warrantor himself if he be living. And albeit the Warrantee or his heirs do recover in this Writ, yet he may after upon occasion vouch the Warrantor or his Heirs notwithstanding. And herein observe it is good policy if a man suspect any thing to bring this Writ of *Warrantia Charia* betimes, because it bindes all the land of the Warrantor from the time of the Writ brought, and not any of his other lands he had before that time that are now aliened.

What words and clauses in a Deed will make a Warranty. Or not. The words *Dedi & concessi*, or *Dedi* onely in a Feoffment do make a Warranty, when an estate of frank tenement or inheritance doth pass by the Deed. But the word *Concessi* only, or *Demisi & concessi*, do not make such a Warranty. And by force of the Statutes of *Binham*, chap. 6. *Dedi* is made an expresse Warranty during the life of the Feoffor.

Co. super
Lit. 183.
384. Co. 4.
81.

The word, *Warrantizo*, or *Warrant* is the only apt and effectual word to make an expresse Warranty or a Warranty in Deed, and therefore this word only is used in Fines. And the words *Defendo*, or *Acquiesco*, albeit they be commonly used in Deeds, yet of themselves without the other, will not make a Warranty.

Lit. Sect.
713. Co. 5.
17. 18.

If a man by Deed doth grant to warrant land to *I S* and his heirs, and the Warrantor doth not binde his heirs to the Warranty; or doth not warrant to *I S* and his Heirs but to *I S* onely; or doth warrant to *I S* and his Assigns, and not to *I S* and his Heirs, or doth binde himself and his heirs to warrant the land, but doth not say how long, nor against whom; these are good Warranties, but how they shall be taken see afterwards.

Dier 43.
Co. super
Lit. 385.

5. To what things a Warranty may be annexed and extended. And to what not. And how.

A Warranty in Deed may be annexed to estates of inheritance or free hold, and that not only of corporeal things which pass by livery, as Houses Lands, or the like but also of incorporeal things which lie in grant, as Advowsons, Rents, Commons, Eftovers, and the like, which issue out of lands or tenements, and that not onely to inheritances in fee, but also to such as are newly created, as a man (some say) may grant a rent &c. *de novo*, out of land for life, in tail, or in fee with Warranty. So a Warranty in law may extend to a rent newly created, and therefore if such a rent be granted in exchange for an acre of land, this Exchange and Warranty thereunto annexed is good. But a Warranty may not be annexed to an estate or Lease for years, albeit it be a Lease of one thousand years, nor to any other chattel, and therefore in all actions the which Lessee for years may have as trespass &c. a Warranty cannot be pleaded in bar.

Co Super
Lit. 366.
385.

Co. super
Lit. 372.
385. Lit.
386. 738.
745. 706.

A Warranty may be made upon any kind of conveyance, as upon Fines, Feoffments, Gifts, &c. also a Warranty may be made by and upon releases and confirmations made to the Tenant of the land, albeit he that makes the release or confirmation hath no right to the land, &c. And yet some say, that by a release or confirmation where there is no estate created, or transmutation of the possession, a Warranty cannot be made to the Assignee. But if A be seised of land in fee, and B doth release to him, or doth confirm his estate in fee with Warranty to him, his Heirs and Assigns, in this case all men agree this Warranty to be good; and so also it seems it is in the case last before, and that both the party himself, and the Assignee may vouch,

Co. super
Lit. 384.
386.

A Warranty in law may be good in his creation, albeit it be made without Deed, for if a man by his last Will and Testament devise lands to another man for life, or in tail, rendering rent; to this estate there is a Warranty in Law annexed.

6. VVhat shall be a good Warranty in Law. And how it shall bar and binde.

Co. super
Lit. 384.
F.N. 8.
394. Co.
480.

The words *Dedi & concessi*, or *Dedi* onely in a Feoffment, make a good Warranty in law. But the word *Concessi* onely in Fine or Feoffment, doth not make a Warranty in law. And albeit there be an expresse Warranty in the Deed, yet this doth not take away the implied Warranty of the law. And this Warranty in Law by *Dedi & concessi*, or by *Dedi* only, is a general Warranty during the life of the Feoffor.

Co. super
Lit. 102.
384.

Every Partition and Exchange implieth in it, and hath annexed to it a special Warranty in Law, and how it shall bar and be extended, see in *Exchange*.

Partition. Exchange.

Co. 4. 80.

Every tenure by homage Ancestrel, i. where a Tenant and his Ancestors have held land of a Lord, and his Ancestors time out of minde by homage hath a Warranty in law annexed to it, by which the Lord is bound to warrant to the Tenant and his Heirs.

Co. super
Lit. 334.

If one make a gift in tail or Lease for life of land by Deed or without Deed reserving a rent, or of a rent-service by Deed; in these cases there is annexed an implied Warranty against the Donor or Lessor, his Heirs and Assigns.

Co. super
Lit. 384.

When Dower is assigned to a woman, there is a Warranty in Law included, which is that the Tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable.

Co. super
Lit. 384.

And this Warranty in Law is of the nature of a lineal Warranty, and shall binde as a lineal Warranty onely, for it doth never bar any collateral title. And hence it is, that this Warranty and assets in some cases is a good bar, as if Tenant in tail exchange for other lands which are descended to the issue, and he hath accepted of them, or if not, that other lands are descended to him. But if tenant in tail of lands make a gift in tail or Lease for life rendering rent and die;

7. What shall
be said a good
Warranty in
Deed. Or not.
And how it
shall bar and
bind. Infant.

die; in this case this is no bar. And yet if other Assets in fee simple descend, this Warranty in Law and Assets is a good bar.

To every good Warranty in Deed that must bar and binde these things are requisite. 1. That the person that doth Warranty, be a

Co. super
Lit. 397.

person able, for if an Infant make a Feoffment in fee of land, and thereby doth binde him and his Heirs to Warranty the land, in this case albeit the feoffment be onely voidable, yet the Warranty is void. 2. That the Warranty be made by Deed in writing, for if a

Lit. Sec.
703.
Co. super
Lit. 384.

man make a feoffment by word, and by word binde him and his Heirs to warrant the land; this is not a good Warranty. So if a man give lands to another by his last Will, and thereby binde him and his Heirs to warrant it; this Warranty albeit the Will be in writing, is void. 3. That there be some estate to which the Warranty is annexed, that may support it, for if one covenant to warrant land to another and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted; in these cases the Warranty is void. 4. That the estate to which the Warranty is annexed, be such an estate as is able to support it, and therefore that it be a Lease for life at the least, for if one make a Lease for years of land, and binde himself and his Heirs to warrant the land; this is no good Warranty, neither will it have the effect of a Warranty: but this may amount to a Covenant on which an action of Covenant may be brought. 5. That the Warranty descend upon him that is Heir of the whole blood by the Common Law to him that made the Warranty, and not upon another: For if Tenant in tail in Burrough English (where by custom the youngest Son is to inherit) discontinue the tail, and have issue two Sons, and the Uncle release to the discontinuee with Warranty and dieth; this is no good Warranty to binde the Son. So if in this case Tenant in tail discontinue the tail with Warranty, &c. having two Sons, and die seised of other Lands in the same Burrough in fee simple; to the value of the land in tail; the younger Son is not barred by this Warranty. So if one give his land to the eldest Son, and the Heirs males of his body, the remainder to the second Son, &c. and the eldest Son doth alien with Warranty having issue a Daughter and die; this is no good Warranty to bar the second Son. So if Tenant in tail have issue two Daughters by divers venters and die, and they enter and a stranger doth disseise them, and one of them doth release all her right, and biade her and her Heirs to warrant it; in this case Warranty is not good to bar the Sister: But if they had been by one venter, *contra*. So if two Brothers be by demi-venters, and the eldest doth release with Warranty to the disseisor of the Uncle, and dieth without issue, and the youngest dieth; this is no good Warranty to bar the younger Brother, for a Warranty must ever-

Co. 10. 56.
& super
Lit. 384.

Co. super
Lit. 378.
26. H. 8. 9.

Co. super
Lit. 12.
Lit. fol.
161. Sec.
735.

Lit. fol.
161.

Lit. Sec.
737.

Co. super
Lit. 387.
Lit. Sec.
718.

more

Ele. Sect.
745, 746.

Co. 80. 96.
97. Super
Lit. 388.
21 H. 7.

Tit. Sect.
714.

Co. super
Lit. 370.

Lit. Sect.
716. Co. 1.
677. 40.
Super Lit.
380.

more descend upon him that is Heir at the Common Law to him that made it. 6. That he that is Heir do continue to be so, and that neither the descent of the title nor the Warranty be interrupted, for if one binde him and his Heirs to warranty, and after is attainted of Treason or Felony, and die, this Warranty doth not binde his Heir. So if Tenant in tail be disseised, and after release to the disseisor with Warranty, and after the Tenant in tail is attainted of Felony, and hath issue and die, this Warranty will not binde the issue. 7. That the estate of freehold that is to be barred be put to a right before or at the time of the Warranty made, and that he to whom the Warranty doth descend, have then but a right to the land, for a Warranty will not bar any estate of freehold or inheritance, in *esse* in possession, in reversion, or remainder, that is not displaced and put to a right before or at the time of the Warranty made, though after at the time of the descent of the Warranty, the estate of freehold or inheritance be displaced and divested. And therefore if there be Father and Son, and the Son hath a rent-service, suit to a mill, rent-charge, rent-seck, common of pasture or other profit appender out of land of the Father, and the Father maketh a Feoffment in fee with Warranty and dieth, this shall not bar the Son of the rent, common, &c. And albeit the Son after the Feoffment with Warranty, and before the death of the Father had been disseised, and so being out of possession, the Warranty had descended upon him, yet this Warranty should not binde him. So if my collateral Ancestor release to my Tenant for life with Warranty and die, and this Warranty descend upon me, this shall not bind my reversion or remainder. But if in the case before the Son be disseised of the rent, &c. And affirm himself to be disseised by the bringing of an Assise (for otherwise he shall not be said to be out of possession of a rent, or the like) and after the Father doth release with Warranty and die, in this case the collateral Warranty shall binde and bar the Son of his rent, &c. And if in the last case my Tenant for life be disseised, and my Ancestor doth release to the disseisor with Warranty and die, this is a good Warranty to bar and binde me. 8. That the Warranty do take effect in the life time of the Ancestor, and that he be bound by it, for the Heir shall never be bound by an express Warranty, but where the Ancestor was bound by the same Warranty, and therefore a Warranty made by Will is void. 9. That the Heir claim in the same right that the Ancestor doth. For if one be a Successor onely in case of a Corporation, he shall not be bound by the Warranty of a natural Ancestor. 10. That the Heir that is to be barred by the Warranty be of full age at the time of the fall of the Warranty, for if my Ancestor make a Feoffment, or a release with Warranty, and at this time I am within

age, and after he die, and the Warranty descend upon me within age, this Warranty shall not binde me: but if I become of age after the Warranty of my Ancestor, and before his death, in this case the Warranty may bar me. And in the first case it will bar me also, whiles it is in force; but I may by my entry avoid it. And the same law is of a woman covert. And yet if the entry of an Infant or woman covert be not lawful when the Warranty doth descend, in this case the Warranty shall binde them as well as any other, for such a Warranty cannot be avoided but by entry and avoiding the estate. And where the Husband is within age at the time of the descent of a Warranty to his Wife, and the entry of the Wife is taken away, there the Warranty shall bind the Wife.

If lands be given to A for life, and after to the next heir male of A and the heirs males of the body of that heir male, and A having issue B, makes a Feoffment of the land with Warranty to I S this is a good Warranty, and a bar to the issue, for a man may be barred of his right by a Warranty which he could never avoid, as where Lessee for life is disseised, and a collateral Ancestor of the Lessor doth release to the disseisor with Warranty and die, and this doth descend upon the Lessor, by this he is barred.

Co. 1. 66.
44 Ed. 3.
30-44. Aff.
pl. 35.

A Warranty made for life or in tail is good, and shall binde for so long time, as if Tenant in tail of land let it for life, the remainder to another in fee, and a collateral Ancestor doth confirm the estate of the Tenant for life and die, and the Tenant in tail hath issue, this is a bar to the issue during the life of the Tenant for life. And in this case upon a Voucher the recovery in value shall be put for life onely.

Lit. Sel.
738. Co.
super Lit.
387.

If one make a gift in tail, and grant to warrant the land given according to the gift, this Warranty is good no longer then the estate doth last. And no Warranty that a Donor can make in this case can bar him of the land, if the Donee die without issue, and the estate determine.

Co. 10. 96.

And where a Warranty doth bar, it is entry and doth extend to all the land, and to all persons upon whom it doth descend, and is a bar of all the right that every one of them hath in the land, so that if they have all right joyntly or severally, or one onely hath all the right, and the rest none, he that hath the right is barred. And therefore if lands be given to A, and the heirs of his body, and for want of such issue to E his sister, and the heirs of her body, and A doth make a Feoffment with Warranty and die without issue having two sisters E and S, this is a bar to E for the whole, albeit the Warranty descend on her and another.

Co. 8. 52.
super Lit.
373.

If there be Tenant for life, the remainder to his Son and Heir apparent in tail, and the Father doth make a feoffment in fee with Warranty

Co. 5. 79.

Warrantie and dieth; in this case this is a good Warranty, and will bar the son, albeit it be made of purpose to bar him. But if by agreement and covin between him and A. and B. he make a Lease to A. who makes a feoffment in fee to B, to whom the Father doth release with Warranty, thinking by a collateral Warranty to bar his son; this is no bar, for this Warranty began by disseisin: And if in the first case the son doth enter in the life time of the Father upon the land, he doth avoid the Warranty.

Co. 1. 66.

If the Father be Tenant for life, the remainder to the next heir male of the Father, and to the heirs males of the body of such next heir male, and the Father makes a feoffment to I. S. with Warranty and dieth; it seems this is a Warranty good bar to the heir; and in this case the heir cannot enter in the life time of his Father, for he cannot be heir male unto his Father, until his Fathers death.

Co. super
Lit. 366,
367. Co. 1.
69. Stat.
Glouc. ch.
1. 6. Lit.
Sect. 714.
715.

If Tenant for life make a feoffment with Warranty, or be disseised, and a release with Warranty, and he in reversion being heir to the Tenant in life doth not enter, but suffer the Lessee for life to die, and thereby the Warranty to fall and descend upon him; in this case the Warranty generally is a bar without any assents. But if he that doth so alien, &c. be Tenant by the courtesie, this is no bar to the heir without assents in fee simple from the Tenant by the courtesie; and then it is a bar for so much. And if the heir for want of this assents at the time doth recover the land from his Mother, and after assents doth descend from the Father; in this case the Tenant shall recover the same land of the Mother again. And if she that doth so alien, &c. to be Tenant for life or the

Stat. 11 H.
7. chap. 20.
Lit. Sect.
727. Co.
super Lit.
365.

Co. 3. 58.

inheritance or purchase of her deceased Husband, or given unto her by any of the Ancestors of her Husband, or by any other person seised to the use of her Husband, or of any of his Ancestors; in this case her alienation, release or confirmation with Warranty shall not binde the heir whether he have assents or not. But if a man convey lands to the use of himself, B. his wife, and the heirs of his body, and they have issue C. and the father dieth, and C. disseiseth his Mother, or getteth a feoffment from a disseisor, and then suffereth a recovery with a single Voucher, and after the Wife doth release to the recoverer with Warranty, in this case the Warranty is a bar to the issue, and not void by the Statute of 11 H. 7.

Co. super
Lit. 366,
367. Stat.
Glouc. ch.
1. 6. Lit.
Sect. 714.
715.

If the Husband that is seised of lands in the right of his Wife levy a fine, or make a feoffment in fee with Warranty, and the wife dieth, and then the Husband dieth: this Warranty shall not binde the heir of the Wife without assents of other land in fee simple from the Father, albeit he be not Tenant by the courtesie, but it is before her death that he doth make the estate and the Warranty. But a fine levied by the Husband and Wife, in this case is a good bar to the heir.

If

Fine.

If Tenant in tail that is in of another estate, *i. e.* either by disseisin, or by the feoffment of a disseisor, doth suffer a common recovery, and a collateral Ancestor of the Tenant in tail doth release with Warranty to the Recoverer, and after the Recoverer doth make a feoffment to uses executed by the Statute of 27 H. 8. and after the collateral Ancestor dieth, in this case albeit the estate of the land be transferred in the post before the descent of the Warranty, yet it shall binde. So if he to whom the Warranty is made suffer a common recovery, and after the Ancestor dieth. But if Tenant in dower infeoff a villain with Warranty, and the Lord of the villain enter into the land before the descent of the Warranty, and after the woman dieth, this Warranty shall not binde the right of the heir. So if a collateral Warranty be made to a Bastard and his heirs and living, the Ancestor, the Bastard dieth without issue, and the Lord by escheat doth enter, and after the Ancestor dieth, this Warranty doth not binde.

Co. 3. 61.
22. Aff. pl.
72. 39. A.C.
pl. 34.

A collateral Warranty may descend upon an issue in tail before the right descend, and yet be good with this difference, that the right be in *esse* in some of the Ancestors of the heir at the time of the descent of the Warranty, as if a Tenant in tail discontinue the tail in fee, and the Discontinuee is disseised, and the brother of the Tenant in tail releaseth all his right, &c. to the disseisor with Warranty, and dieth without issue, and the Tenant in tail hath issue and dieth, in this case the issue is barred: But otherwise it is where the right is not in *esse* in the heir or any of his Ancestors at the time of the fall of the Warranty, as if Lord and Tenant be, and the Tenant make a feoffment in fee with Warranty, and after the feoffee doth purchase the Seignory, and after the Tenant doth cease, in this case the Lord shall have a Cessavit, for a Warranty doth never bar any right that doth commence after the Warranty.

Lit. Sect.
7 H. Co. in-
per. Lit.
382.

8. What shall
be said a line-
al Warranty.
And how such
a Warranty
shall bar.

If the case be so that if no such Warranty had been made by the Father or other Ancestor, the right of the lands or tenements so warranted, had or might have descended or come from the same Ancestor, and that from and by him that made the same Warranty, such a Warranty is a lineal Warranty. As if a man be seised in fee of land, and make a feoffment of it to another, and binde him and his heirs to warrant the land, and hath issue and die, and the Warranty doth descend upon the issue; this is a lineal Warranty, for that if none such had been, the right of the land had descended to him as heir to his Father, and he must have made his descent by him. And if there be Grandfather, Father and Son, and the Grandfather be disseised, and the Father release to the disseisor being in possession with Warranty, &c. and dieth, and after the Grandfather dieth, this is a lineal Warranty to the Son, and albeit in this case the Warranty descend before

Lit. Sect.
703. 711.

Co. super
Lit. 374.

Lit. Sect.
707.

Co. 1. 66,
67.

Co. 8. 12.
New terms
of the law
tit. War-
ranty.

Lit. Sect.
719.

Lit. Sect.
714.

Co. super
Lit. 575.

Lit. Sect.
718.

before the right, yet it is a good bar. And if there betwo Brothers, and the Father is disseised, and the eldest Brother doth release with Warranty, and die without issue, and after the Father dieth, and the Warranty doth descend to the younger Son, this is a lineal Warranty to him. And if lands be given to A. for life, the remainder to his right Heirs, and he doth make a feoffment with Warranty and die, this is but a lineal Warranty: And if two Parcenours be, and the eldest enter into all the land to her own use, and then doth make a feoffment with warranty and dieth without issue, this as to her own part is a lineal Warranty, but as to her Sisters part it is a collateral Warranty. And in every case where one doth demand an estate tail, if any Ancestor of the issue in tail, whether he had possession of the land or not, hath made a Warranty, and if the issue, that were to bring a Writ of Formedon, may or might have by possibility by some matter that might have been done conveyed to himself a title by force of the gift by him that made the Warranty, this is a lineal Warranty. As if a man be seised of land of an estate tail to him and the Heirs of his body begotten, and make a feoffment of it and bind him and his Heirs to warrant it, and hath issue and dieth, this Warranty descending upon the issue is a lineal Warranty. And if lands be given to one and the Heirs Males of his body, and for want of such issue to the Heirs Females of his body, and the Donee doth make a feoffment with Warranty, and hath issue a Son and a Daughter and dieth, this Warranty is lineal to the Son, and if the Son die without issue male, it is a lineal Warranty from the Father to the Daughter. But if the Brother in his life time release to the Discontinuee, &c. with Warranty, &c. and after dieth without issue, this is a collateral Warranty to the Daughter. If lands be given to the Husband and Wife, and the Heirs of their two bodies engendred, and they have issue, and the Husband discontinue and die, and after the Wife doth release with Warranty and die, this is a lineal Warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the Husband doth release with warranty and dieth, and after the Wife dieth, this is a lineal Warranty to the issue for all the land. And if Tenant in tail have issue three sons and discontinue, and the middle Brother doth release with Warranty, and die without issue, and after the Father dieth, and after the elder Brother dieth without issue, so that the Warranty doth descend to the younger Brother, this is a lineal warranty to him. And if a Father give land to his eldest Son and the heirs males of his body, &c. the remainder to the second Son, &c. if the eldest son alien in fee with Warranty, &c. and hath issue female, and dieth without issue male, this is a lineal Warranty

to the second. And in all these cases of a lineal Warranty, if the right of the estate to be barred be the right of an estate in fee simple, it is a bar without any assents: For the Rule is, That as to him that demandeth fee simple by any of his Ancestors, he shall be barred and bound by a lineal Warranty that doth descend upon him, unless he be restrained by some Statute. But it doth not binde the right of an estate in fee and tail without assents, for in that case the Rule is, That as to him that demandeth fee tail by Writ of Formedon in the Descendor, he shall not be barred by a lineal Warranty, unless he hath assents by descent in fee simple, of other land from the same Ancestor that made the Warranty, and then it is a bar for so much onely as doth descend to him and no more.

Cic. 842.
711. 742.
Doct. & St.
152. 7. 152.
Co. 3. 52.

And yet if the issue in tail do alien the assents descended and die: in this case the issue of that issue is not barred by this Warranty and assents. But if the issue to whom the Warranty doth descend, bring his Writ of Formedon, and is barred by judgement by reason of the Warranty and assents: in this case albeit he alien the assents afterwards, yet the estate tail is barred for ever.

Co. super.
Lit. 393.

9. What shall be said a collateral Warranty. And how such a Warranty shall bar.

If tenant for life do alien in fee with Warranty, or be disseised and release to the disseisor with Warranty and dye, and the Warranty descend on him in reversion or remainder: this is a collateral Warranty. So if the Lessee for life be disseised, and a collateral Ancestor of him in reversion release with Warranty and die, and the Warranty descend on him in reversion, this is a collateral Warranty, for that is collateral which is collateral to the title of the land. And if a man seised of lands in fee have issue two Sons, and the father dieth, and the younger Son doth enter, and doth alien the land with Warranty, and die without issue: this is no collateral Warranty that is descended on the elder brother.

Co. 3. 7.
21 H. 7. 10.
Lit. Sect.
745.

Lit. Sect.
707. Doct.
& St. 152.

And if a Son be disseised of his own land, and bring an Assise, and after the Father doth release to the disseisor with Warranty and dieth: This Warranty that doth descend to the Son is a collateral Warranty. And if a Father disseise his son of the land he hath of his own purchase, without any intent to alien afterwards and to bar his son, and after he doth make a feoffment with Warranty, and die before the entry of his son, so that the Warranty doth descend, this is a collateral Warranty. If there be Father and two Sons, and the Father is disseised, and the younger son doth release with Warranty to the disseisor and dye without issue, and then the Father dieth: In this case the Warranty now descended is a collateral Warranty. If a Lease be made for life to the Father, the remainder to his next Heir, and the Father is disseised and doth release with Warranty and dieth: this is a collateral Warranty to the Heir. And if the Husband discon-

21 H. 7. 10.

Lit. Sect.
704.

Lit. Sect.
707.

Co. super.
Lit. 388.

continue.

time the right of his wife, and an Ancestor collateral to the wife to whom she is heir doth release with warranty and dye, and after the husband dieth, this is a collateral warranty and a bar to her. And in every case where a man doth demand an estate tail by a writ of Formedon, if any Ancestor of the issue in tail which hath or hath not possession maketh a warranty, and the issue that is demandant cannot by any possibility that may be done convey to him a title by force of the gift, from and by him that made the warranty, this is a collateral warranty, as if tenant in tail discontinue the tail and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in tail; this is a collateral warranty. So if such a discontinuee make a feoffment in fee, or be disseised, and the uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on the issue; this is a collateral warranty. If a tenant in tail have three sons, and discontinue the tail in fee, and the middle brother doth release to the discontinuee with warranty, and after the tenant in tail dieth, this is a collateral warranty to the elder brother. If one have issue three sons, and giveth land to the eldest, and the heirs of his body, and for want of such issue to the middle, and the heirs of his body, the remainder to the third, and the heirs of his body, and the eldest doth discontinue the tail in fee with warranty, and die without issue, this is collateral to the middle son. In the same manner it is in case where the middle son hath the same land by force of the same remainder, because his elder brother made no discontinuance but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue, this is a collateral warranty to the youngest son. And in this case if any of the sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty; this is a collateral warranty to that son upon whom the warranty doth descend. If lands be given to A, and the heirs of his body, and for want of such issue to E, his sister, and the heirs of her body, and A. doth make a feoffment with warranty, and dye without issue, having two sisters E and S, this is a collateral warranty to E. If lands be given to a man and the heirs of his body begotten, who taketh a wife and hath issue a son by her, and the husband doth discontinue the tail in fee and dieth, and after the wife doth release to the discontinuee with warranty and dieth, and the warranty doth descend to the son; this is collateral to him. If tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail doth release to the disseisor with warranty in fee, and dieth without issue,

Co. 10. 96.
21. Sect.
7. 9. Plow.
234. Kew
78.

Lit. 908.
708.

Lit. Sect.
716.

Co. 8. 52.
Lit. Sect.
713.

Lit. Sect.
701.

fee, and the tenant in tail hath issue and dieth; this is collateral as to the issue. If tenant in tail have issue two daughters, and die, and the elder enter into all to her own use, and thereof make a feoffment in fee with warranty, and dye without issue, this warranty as to the other sisters part is collateral, but not as to her own. If the husband and wife, tenant in special tail, have issue a daughter, and the wife die, and the husband by a second wife have issue another daughter, and discontinueth in fee and dieth, and a collateral Ancestor of the daughters release to the discontinueth with warranty and dieth, and the warranty descend upon both the daughters, this is a collateral warranty to them. If lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the father die, and the brother release with warranty, and dye without issue, this is collateral to the daughter. If tenant in tail make a lease for life, the remainder to another in fee, and a collateral Ancestor doth confirm the estate of tenant for life with warranty and die, and after the tenant in tail dye having issue, this is a good binding collateral warranty during the estate for life. And in all these and such like cases of a collateral warranty; whether the right be the right of an estate tail, or the right of an estate in fee simple that is to be barred, it is a barre without any assents, for in this case the rule is, that a collateral warranty is a bar to him that demandeth fee simple, and also to him that demandeth fee tail, without any other descent of lands in fee simple, so that the heir on whom the same warranty is descended, can never have the land so warranted, whiles the warranty doth continue in force but is bound thereby, except it be in some special cases restrained by Act of Parliament, as where the husband alone during his wives life, or after her death, being tenant by the curtesie make a feoffment by fine or deed of his wives land, which she hath by descent or purchase, with warranty; this will not bar her heir without assents of other lands in fee simple descended from the same Ancestor that made the warranty. Or where a wife after her husbands death, shall alone, or with her succeeding husband alien, release, confirm, or discontinue with warranty, the land she holdeth in dower, or in tail, of the gift of her former husband, or any of his Ancestors, this warranty is voydable, and will not bind with assents.

Co. super
Litt 371.

Litt. Sed.
738.

Litt. Sed.
712 Co.
super Lit.

374.
Co. 10. 66.

Stat. of
Glouc. ch.

3.
Co. super

Litt. 365.
Star. 11. H.

7. chap. 20.

ro. What shall be said a warranty that doth begin by Disseisin. And what such a warranty doth work.

If the son purchase land, &c. and after let it to his father, or any other Ancestor for years, or at will, and he by his deed doth infeoff a stranger, and that with warranty, and after dyeth, whereby the warranty doth descend upon the heir, this warranty doth commence by disseisin. So if tenant by Elegit, Statute Merchant, Guardian in Chivalry, or Sockage, or because of Nurture

Litt. Sed.

699 700.

701. 702.

Finch 82.

Co. super.

Litt. 367.

ture, make a feoffment with warranty, and this warranty doth descend on his heir; this warranty doth commence by disseisin. So if one that hath no right at all enter into my land, and make a feoffment to another with warranty. So if one Coparcenor enter into the whole land, and make a feoffment in fee with warranty, this warranty as to the one moiety doth begin by disseisin. So if father and son purchase lands to them jointly, &c. and the father alien the whole to another with warranty, &c. and after the father dieth, this warranty as to the one moiety doth begin by disseisin. But if the purchase be to them two and the heirs of the son it is otherwise, for if the son enter in the life time of the father, the warranty is avowed for all, but if hee doe not enter, then as to the fathers moiety it is a collateral warranty. And if the purchase be to the father and son and the heirs of the father, and the father alien with warranty, &c. in this case the warranty is good for the whole.

Co. 5. 80.
Super Lit.
366, 367.

If the father be tenant for life, the remainder to his son and heir in fee, and the father by covin and consent of purpose to bar the heir by a collateral warranty, maketh a lease for years, to the end that the lessee should make a feoffment in fee, that the father may release to the feoffee with warranty, and all this is done accordingly, and the father dieth, and the warranty doth descend to the sonne; in this case the warranty shall be said to beginne by disseisin. But if the father in this case make a feoffment in fee with warranty and die; this is a good warranty to binde the sonne albeit it be done of purpose to bar him. So if one brother make a gift in tail to another, and the uncle doth disseise the donee, and infeoffeth another with warranty, the uncle dieth and the warranty descendeth on the donor, and then the donee dieth without issue, this warranty doth begin by disseisin. So if the father and son, and a third person be jointenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the son dieth, in this case, as to the part of the third person, and to the part of the son, the warranty shall be said to begin by disseisin. But releases at this day by a tenant for life, to a disseisor or any other without covin, albeit it be to the intent to barre him in reversion, shall barre him, for intent without covin and disseisin shall not avoid a warranty. And examples of warranties that do begin by disseisin, have these qualities: 1. That for the most part the disseisin is done immediately to the heir that is bound by the warranty. 2. The warranty and disseisin are *simul* and *semel*. And yet if a man disseise another with intent to make a feoffment with warranty, albeit the feoffment be made twenty years after the disseisin, yet it shall be said to be a warranty that doth begin by disseisin. But in all these cases of warranties that do begin by disseisin, this is the rule, That the

they are altogether void and without force as to all others but to the parties themselves that do make them; and therefore they do not bar or binde any others at all of their right that have any. And the same Law is of a warranty that doth begin by abatement or intrusion; that is when an abatement or intrusion is made of purpose to make a feoffment in fee with warranty. And so also it is where the tenant dieth without heir, and an ancestor of the Lord doth enter before the entry of the Lord, and make a feoffment in fee with warranty; in this case this shall not binde the Lord, because it doth begin by wrong.

11. How a warranty shall be taken.

All warranties in general are favourably taken in Law, because they are part of mens assurances. Every warranty in Law is taken for, and hath the effect of a lineal warranty.

The warranty that is made by *Dedi & Concessi*, or *Dedi* only in a feoffment is and shall be taken for a general warranty against all persons to the feoffee and his heirs, during the life of the feoffor only; albeit there be no service reserved by the deed nor heir named; but it shall not extend to the assignee of the feoffee. And if there be any service reserved on the deed, then it shall extend against the heir also.

Co. 1. 81.
5. 17.

The warranty in law that is made upon a gift in tail, or lease for life rendering rent, is a special warranty against the donor and lessor, and his heirs and assignes, so that the donee or lessee may vouch the grantor after the grant of the reversion, or the grantee of the reversion after the attornment of the tenant at his election.

Co. 4. 81.
Super Lit.
384.

The warranty in law that is made upon an Exchange, is special in diverse respects, for it extendeth reciprocally to, and against the heirs of both parties; and it doth extend onely to the same land that is given in exchange, and none other; and no use can be made of it but by voucher, for no *Warrantia Carta* doth lie upon it. So also the warranty that is made in dower, is taken to extend only to the other two parts of the land.

Co. 4. 131.
Super Lit.
384.

The warranty in law that is made upon the tenure of Homage Ancestrel, extendeth reciprocally to the heirs, and against the heirs of both parties.

Co. Super
Lit. 384.

If a feoffment be made of land to three jointly, and the feoffors do warrant the land to the feoffees and every of them; this warranty shall be joint and not several. But if the estate be several, as if one grant white acre to *A*, and black acre to *B*, and grant to warrant the land to them, and either of them; in this case the warranty shall be several.

Co. 5. 59.

If a man of full age, and an infant join in a feoffment with warranty; this shall be taken for a good warranty as to the whole for him that is of full age and void for the infant, and not void in part and good in part.

Co. Super
Lit. 367.

If a man make a feoffment in fee, and bind his heirs but not himself

Co. Super
Lit. 384.
to.

Co. super
Lit. 47.
385. Dier
43. Kelw.
198. Co. 6
49.

to warranty; in this case and by this, his heirs shall not be bound, and it seems also that it will not binde the warrantor himself. But if a man binde himself to warrant, and not his heirs by the feoffment; in this case the feoffor himself is bound to the warranty but not his heirs. for it is a maxim of Law, That the heir shall never be bound to any expresse warranty, but where the Ancestor was bound by the same warranty. If one make a feoffment to *B* and his heirs, and thereby doth grant to warrant the land and doth not say to *B* and his heirs; yet this warranty shall be taken to extend to them. But if the feoffor doth grant to warrant the land to *B*, and doth not say to his heirs, this shall not extend to his heirs. And if in this case the warranty be to *B* and his assignes, it shall not extend to his heirs, neither shall the assignes take advantage of it after the death of *B*. And if the warranty be to *B* and his heirs, and not to his assignes also; this shall not extend to his assignes. If one make a feoffment to *A*: *habendum* to him and his heirs, and binde himself and his heirs to warrant the land *in forma pradiſſa*; in this case the warranty shall extend to the feoffee and his heirs.

Co. 1. 1.

If one grant to warrant land to another and his heirs, and doth not say against what persons, this shall be taken for a general warranty against all men.

If one make an estate and grant to warrant the land, but doth not say how long, this shall be taken for as long as the estate to which the warranty is knit doth last.

Dier 328.

If a warranty be made against any special persons, it shall extend to them and no further, and it shall extend in all cases for and to all titles and entries upon title, and it shall not in any such cases extend to tortious and unlawful entries.

Co. super
Lit. 366.

If a man be seised of a rent-seck, issuing out of the Manor of *Dale*, and he take a wife, and the husband doth release to the terre-tenant, and warranteth *tenementa pradiſſa* and dieth, this warranty shall extend to the rent, as well as to the land, and therefore if the wife sue for her thirds of the rent, the terre-tenant may vouch the heir. And regularly the warranty doth extend to all things issuing out of the land, *viz.* to warrant it in the same manner and plight as it was in the hands of the feoffor, and he shall vouch as of lands discharged. And therefore if grantee of a rent, grant it to the tenant of the land on condition, and the tenant doth make a feoffment of the land with warranty: in this case the warranty shall not extend to the rent, albeit the feoffment be made of the land discharged of the rent. And if a woman have a rent-charge in fee, and she doth intermarry with the tenant of the land and a stranger doth release to the tenant of the land with warranty: this warranty shall not extend to bar any action to be brought after the death of the wife for the rent. But if in this case the re-

Co. super
Lit. 388.
339.

nant make a feoffment in Fee with warranty and dieth, the Feoffee in a *cui in vita* brought by the wife shall vouch as of lands discharged at the time of the warranty made. So if tenant in taile of a rent-charge purchase the land and make a feoffment with warranty, and the issue bring a Formedon of the rent, the tenant shall not vouch, &c.

12. Who may take advantage of a warranty, and how and against whom it may be taken.
Assignees.

All those that are parties to the warranty, i. such as are named in the Deed regularly, shall take advantage of the warranty; as if one doth warrant land to another, his heirs, and assigns; in this case both the heirs and the assigns may take advantage of it and they both may vouch or rebut, or have a *Warrantia carta*, so as they come in in privity of estate, for otherwise the heir or assigns can not vouch, or have a *Warrantia carta*, and yet he may rebut notwithstanding in divers cases. But those that are not named for the most part shall not take advantage of the warranty; and therefore if land be warranted to *I. S.* and not to him and his heirs, or to him and his assigns, or to him, his heirs and assigns; in these cases neither the heir nor the assignee may vouch or have a *Warrantia carta*; and yet in some cases where it is so, the assignee or tenant of the land may rebut.

Co. super
Lit. 365
5. 17.

The warranty annexed to an Exchange or Partition, by *Dedi*, and by homage Ancestrel, doth alwaies goe in Privity, and therefore an assignee in these cases can take no advantage of it. And yet in the cases of Exchange and *Dedi*, an assignee may rebut. But the assignee of a lessee for life may take advantage of the warranty in law annexed to his estate.

Co. super
Lit. 384.

If one grant to warrant land to another, his heirs and assigns; in this case the heirs, or assigns, heir of the assignee, or assignee of the heirs of the Feoffee, or assignees of assignees *in infinitum*, shall take advantage of the warranty. And therefore if one infeoffe *I. S.* to have and to hold to him, his heirs and assigns, and warrant the land to him, his heirs and assigns, and *A* doth infeoffe *B* and his heirs, and *B* dieth; in this case the heir of *B* shall vouch as assignee to *A*. And if one infeoffe *A* and *B* *H. bendum* to them and their heirs, and warrant the land to them, their heirs and assigns, and *A* die, and *B* doth survive and die, and his heir infeoffe *C*, in this case *C* shall take advantage of this warranty as assignee. If one infeoffe *A* with warranty to him, his heirs and assigns, and *A* doth infeoffe *B*, and *B* doth reinfeoffe *A*. In this case neither *A* or his assigns shall ever take any advantage of this warranty. And yet if *B* infeoffe the heir of *A* he may take advantage of the warranty.

Co. s. 17,
super Lit.
384, 385.

If one make a feoffment by Deed with warranty to the Feoffee, his heirs and assigns, and the Feoffee doth make a feoffment over to another by word without deed; in this case the second Feoffee shall have

- have all the advantage of this warranty, for an assignee by word shall have the same advantage that an assignee by deed shall have.

If a feoffment be made with warranty to a man and his heirs and assigns, and he make a gift in tail the remainder in fee, and the donee make a feoffment in fee; this feoffee shall not vouch as assignee, but he must vouch his donor upon the warranty in Law; and yet he may rebut.

If lands be given to two, brethren in fee simple, with warranty to the eldest and his heirs, and the eldest die without issue; in this case albeit the other brother be his heir, yet he shall have no advantage at all by the warranty, because he comes in above the warranty. But generally all that claime under the warranty shall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a feoffment to two their heirs and assigns, and one of them doth make a feoffment in fee, this feoffee in this case shall not take advantage as assignee.

Co. Super
Lit. 385.

An assignee of part of the land shall take advantage of a warranty, as if a man make a feoffment of two acres with warranty to him, his heirs and assigns, and the feoffee doth make a feoffment of one acre of it to another; in this case the second feoffee shall take advantage of the warranty as assignee. And therefore herein there is a difference between the whole estate in part, and part of the estate in the whole or in any part, for if a man have a warranty to him, his heirs and assigns, and he make a lease for life, or gift in tail; in these cases the lessee or donee shall not take advantage of the warranty as assignee: but they may vouch the lessor or donor upon the warranty in Law. But if a lease for life be made the remainder in fee; such a lessee may vouch as assignee upon the first warranty.

Co. Super
Lit. 384.

If the father have a feoffment made to him and his heirs with warranty, and he make a feoffment to his son and heir with warranty; in this case the son may take advantage of the first warranty after his fathers death. If a man infeoffe a woman with warranty, and they intermarry and are impleaded, and upon the default of the husband the wife is received; in this case she may vouch her husband. *Et sic e converso*. If a woman infeoffe a man with warranty, and they intermarry and are impleaded: the husband in this case shall vouch himself and the wife.

Co. Super
Lit. 390.

He that comes into the land merely by act of Law in the post, as the Lord by Escheat, or the like, shall never take advantage of a warranty, and therefore if tenant in dower infeoffe a villain with warranty, and the Lord of the villaine enter: or a feoffment be to a bastard with warranty, and he die without issue, and the Lord enter by Escheat: in these cases the Lord shall never take advantage of these warranties. But otherwise it is where a

26 H. 8. 7.
22 Aff. pl.
37.
29 Aff. 34.
Co. 3. 63.
63.

man comes to the land by limitation of use, or a common recovery, which is by the act of the party, for if tenant in tail being in of another estate, & by disseisin, or Feoffment of a disseisor suffer a common recovery, and a collateral Ancestor of the tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a feoffment to uses which are executed by the Statute of 27 H. 8. and after the collateral Ancestor dieth, in this case the terre-tenants may take advantage of the warranty by way of rebuttal, albeit the estate be transferred in the Post. So if he to whom the warranty is made, suffer a common recovery, and after the Ancestor dieth, the recoveror may take advantage of this warranty by way of rebuttal, for any man that hath the possession of land, albeit he have no deed to shew how he came by the possession of it, or how he is assignee, may rebut the demandant, and so bar him, and defend his own possession. And therefore the tenant by the curtesie, donee in tail that is in of another estate, an assignee by force of a warranty made to a man and his heirs, feoffee of a donee in tail may rebut and bar the demandant by the warranty.

If one infeoff another of an acre of ground with warranty, and hath issue two sons, and dieth seised of another acre of land of the nature of Burrough English, in this case albeit the warranty descend upon the eldest son onely, yet both the sons may be vouched. And so also it is of heirs in Gavelkind; the eldest shall be vouched as heir to the warranty, and the rest in respect of the inheritance. And in like sort the heir at the common law and the heir of the part of the mother shall be vouched, or the heir at the common law may be vouched alone at the election of the tenant. And in like sort the heir at the common law shall be vouched with the heir in Burrough English. And so also a bastard shall be vouched with a *muller*. And if a man die seised of certain lands in fee, having issue a son and a daughter by one venter, and a son by another, and the eldest son entred and dieth, and the land doth descend to the sister; in this case the warranty doth descend on the son, and he may be vouched as heir, and the sister also may be vouched as heir to the land.

If two make a feoffment with warranty, and the one die the survivor shall not be charged alone with the warranty, but the heir of him that is dead shall be charged also. And if two be bound to warrant land, and both of them die, the heirs of both of them ought to be vouched, and shall be equally charged. And if the heir be vouched in the ward of three several persons the one of them onely shall not be charged, but they shall be charged equally.

If a Woman an heir of the disseisor infeoff me with warranty, & after she is married to the disseisor, in this case I may take advantage of this

Co. super
Litt. 376.
1. Ed. 3. 13.
5. H. 7. 2.

Co. 3. 14.
Incer Litt.
386.
16. H. 7. 13.
48. Ed. 3. 5.

Co. super
Litt. 365.
this

this warranty against the disseisee, and rebur him upon it, if he sue me for the land. So if the husband and wife sue me for the land of his wife, and I have a warranty of a collateral Ancestor of the husbands descended to him; in this case I may make use of this to bar the husband and wife.

A warranty lineal or collateral may be defeated, determin'd, or avoided in all or in part. And this is sometimes by matter in Law, and sometimes by matter in deed.

If the estate to which the warranty is annexed be gone the warranty annexed thereunto is gone also. And therefore if an estate tail to which a warranty is annexed be spent, the warranty is determined. And if a man make a gift in tail with warranty, and after the donee doth make a feoffment and die without issue, the warranty is gone. So if tenant in tail discontinue the tail, and the discontinuance be disseised, or make a feoffment on condition, and a collateral ancestor of the issue release to the disseisor or feoffee, on condition, with warranty, and after the discontinuance doth enter upon the disseisor, or on the feoffee for the condition broken; in these cases the warranty made by the collateral ancestor is gone. So if a Seigniorie be granted with warranty, and the tenancy escheat so that the Seigniorie is extinct; hereby also the warranty is defeated. So if a collateral ancestor heretofore had released with warranty: and then had entred into Religion; this warranty had bound, but if after he had been dearraigned the warranty had been defeated.

If the Father make a Feoffment to his son and heir apparent; with warranty and die, so that the warranty doth descend upon the sonne; hereby the warranty is gone. And yet if a Feoffment be made to a man and his heirs, and he dieth leaving issue daughters: in this case the warranty shall be divided and is not determined.

If tenant in tail doth make a feoffment to his Uncle, and after the Uncle doth make a Feoffment in fee with warranty, &c. to another, and after the Feoffee of the Uncle doth reinfeoff again the Uncle, and after the Uncle doth infeoff a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth; hereby the warranty made to the first feoffee is defeated. So if the Uncle make the Warranty to the feoffee, his heirs and assigns, and take back an estate in fee, and after doth infeoff another. But if one make a feoffment with warranty to the feoffee, his heirs and assigns, and the feoffee doth reinfeoff the feoffor and his wife, or the feoffor and a stranger; in these cases the warranty is not defeated, but doth continue still. So if two do make a feoffment with warranty to one, his heirs, and assigns, and the feoffee doth reinfeoff one of the feoffors; in this case the warranty is not gone. And if in the first case the feoffee make an estate to his Uncle in tail or for

13 When a warranty shall be said to be defeated, determined, or avoided. And How. Or not.

Co. Super
Lit. 393.
394.

Co. 10. 96.
11. 3. 62.
Lit. Secd.
719.
Co. Super
Lit. 392.

Co. Super
Lit. 384.
Bo. Gar-
ranty. 27.

Lit. Secd.
743.
Co. Super
Lit. 350.
Lit. Secd.
744.

Life.

life saving the reversion, or a lease for life the remainder over &c. in this case the warranty is only suspended.

If one make a feoffment or release with warranty, and after is attainted of treason or felony; hereby the warranty is gone; and albeit he doe afterwards obtaine his Pardon yet the warranty is not revived.

Co. Super
Lit. 391.

If a feoffment with warranty be made to two or more, and they being Jointenants doe after by deed make partition; by this the warranty is determined. So if two Jointenants be, and one of them disseise the other, and he that is disseised doth recover in an assise and hath Judgement to hold in severally; hereby the warranty is determined. * So if *A* and *B* be Jointenants of white acre for life, and *A* by fine doth grant to *B* *totum & quicquid habet in tenementis*; hereby the warranty is gone. But if a Partition be made by Judgement upon a writ by force of the Statute of 13 H: 8. this doth not defeat the warranty fallen to them, but it shall be divided between them, and they shall all of them take advantage of it.

Co. 6. 12.

* Adjudge
Hil. 22. Jac.
B. R. E. &
Race &
Sholes case

If one infeoffe three with warranty to them and their heires, and one of them release to one of the other two; hereby the warranty is gone for that part. But if one of them release to the other two: in this case the warranty is not gone but doth continue, and they may vouch upon it.

Co. Super
Lit. 385.

If one infeoffe two men and their heires, and one of them doth make a feoffment in fee: hereby the warranty is not determined, but the other may take advantage of it notwithstanding.

Co. Super
Lit. 385.

Release.

If the party that hath the warranty or the estate to which the warranty is annexed release to him that is bound to warrant all warranties, or all covenants real, or all demands: by either of these releases the warranty is gone. So also if by a defeasance made between the parties it be agreed the warranty shall be void, by this defeasance the warranty may be void also. Or if it be so agreed that the warrantee or his heires &c. shall not vouch, or have a *Warranty*; by this the warranty is avoided in part.

Co. Super
Lit. 392.
393.
Lit. Sect.
748.

Defeasance.

If tenant in taile doth infeoffe his Uncle which doth infeoffe another in fee with warranty, if in this case the feoffee release the warranty to his Uncle; hereby the warranty is extinct. But if a gift in taile be made with warranty, in this case a release made by the tenant in taile of this warranty will not extinguish it.

Co. Super
Lit. 391.

If the parties between whom the warranty is, intermarry, hereby the warranty is suspended during the coverture in some cases.

Co. Super
Lit. 390.

If tenant in taile doth make a feoffment in fee with warranty, and disseiseth the discontinuee, and dieth seised, this doth suspend the warranty.

Co. Super
Lit. 390.

If two make a feoffment in fee and warrant the land to the feoffee

Co. Super
Lit. 393.

feoffee and his heirs, and the feoffee doth release the warranty to one of the feoffors; this doth not determine the warranty of the other as to the moiety. So if one doth infeoff two with warranty, and the one of them doth release the warranty; this doth not extinguish the warranty for the other moiety; but it doth continue still.

A warranty also may lose his force by taking benefit or making use thereof, for after a man hath once taken advantage thereof in some cases, he can make no further use of it: of which read *Co. super Lit* 393.

And now having done with Deeds in general, and some of the parts thereof in special, we are in order to come to some special kinds of deeds, wherein we will first begin with a deed of *Feoffment*.

CHAP. IX.

Of a Feoffment.

New
terms of
the Law.
*Co. super
Lit. 9.
Lit. Sect.
57.*

F*feoffamentum* i. *Donatio feodi*, strictly and properly is the gift Feoffment.
or grant of any honors, castles, manors, messuages, lands, houses, Quid.
or other corporal immovable things of like nature, which be hereditable to another in fee simple. i. to him and his heirs for ever, by the delivery of seisin and possession of the things given. And from hence comes the word *Infeoffe*, for by this word and the words Give, and Grant, (as the most apt words for that purpose) is this kinde of conveyance most commonly made. Hence also it is, that he that makes this feoffment, is called the feoffor, and he to whom it is made, the feoffee. Also it is sometimes but improperly called a feoffment when an estate of free hold only doth pass. Infeoffe.

Feoffor.
Feoffee.

See West.
Sym. 4.
part Sect.
235.
*Co. super
Lit. 6.
Co. super
Lit. 49. 9.
Co. 2. 111.
212.
Plow. 554.
9 H. 7. 24.
19 H. 6. 43.
Co. super
Lit. 227.
Perk. Sect.
210.
24 E. 3. 70.
Co. 1. 127.
Co. 6. 70.
Brow. scire
facias. 88.
Plow. 423.
424.*

This kinde of conveyance albeit it may be made in most cases by word without any writing, yet it is most commonly done by writing, and this writing is then called a Deed or Charter of feoffment, but hence is the division of a feoffment by word, or a feoffment by writing. The ancient forms and examples of these deeds are very brief; and yet they had these parts contained in them. 1. The Premises. 2. The *Habendum*. 3. The *Tenendum*. 4. The *Reddendum*. 5. The Clause of warranty. 6. The *In cuius rei testimonium*. 7. The Date. 8. The clause of *Huius testibus*. *Hac fuit candida illius atatis fides & simplicitas qua pauculis lineis omnia fidei firmamenta posuerunt* 2. *Quotuplex*.

* And this manner of conveyance, as it is the most ancient kinde of conveyance, so is it the best and in it excellent of all others, and in some respects doth excel the conveyance by fine or recovery: for it is of that nature and efficacy by reason also of the livery of Seisin 3. The nature and operation of it.

Seisin

Seisin evermore inseparably incident to it, that it cleareth all disseisins, abatements, intrusions, and other wrongfull and defeasible titles, and reduceth the estate clearly to the feoffee, when the entry of the feoffor is lawfull, which neither fine, recovery, nor bargain and sale by deed indented and inrolled, will do when the feoffor is out of possession. And it passeth the present estate of the feoffor, and not only so, but barreth and excludeth him of all present and future right and possibility of right to the thing which is so conveyed, insomuch that if one have diverse estates, all of them pass by his feoffment, and if he have any interest, rent common, or the like, into or out of the land, it is extinguished and gone by the feoffment. And further, it barreth the feoffor of all collateral benefits touching the land, as condition, power of revocation, writs of error, attaint, and the like, insomuch that if a man make an estate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land, by this he is barred for ever of taking advantage of the condition or power of revocation. It destroyeth contingent uses, gives away a future use inclusively, gives away a Seigniorie inclusively, and gives away a right of action: for both the feoffment and livery of seisin incident thereunto, are much favoured in law, and shall be construed most strongly against the feoffor, and in advantage of the feoffee. And besides all this, because it is so solemnly and publickly made, it is of all other conveyances most observed, and therefore best remembred and proved.

4. Who may make or take a feoffment. And what shall be said a good feoffment. Or no; and what shings are requisite thereunto.

1. In respect of the persons thereunto, and the quality of their estate. Men de non sane memorie. Femecoverts. Infant. Attaint persons.

If the feoffment be made by deed, then must the deed be so made, writtten, read, sealed, and delivered, as all other deeds that are well made must be. For which see *Deed supra cap. 4. Numb. 5.*

And in every good feoffment that is made, there must be a feoffor. i. a person able to grant the thing passed by the feoffment; a feoffee. i. a person capable of it, and able to take it, and a thing grantable, and it must be granted in that manner as law requireth. And for this therefore observe that whosoever is disabled by the common law to take, is disabled also to make a feoffment, gift, grant or lease, and many also that have capacity to take by such conveyances, have no ability to grant by them, as men attaint of treason, felony, or in a Premunire, aliens born, the Kings villains, Ideots, mad men, a man deaf, blind and dumb from his nativity, a feme covert, an infant, and a man by duresse, for the feoffments, gifts, &c. of such persons may be avoided. But such persons as have committed treason or felony, if attainder do not follow. such as are attaint of heresie, a leper removed by the Kings writ, from the society of men, bastards, such as are deaf, dumb, or blinde, that have understanding and sound memory, albeit they cannot express their intentions otherwise then by signes, those that are drunken, the villains of a common person before entry, &c. also excommuni-

cate

See Grant
Numb. 4.
Co. super
Lit. 2. 42.
48. Perk.
Sect. 181.
182, 185.
Brev. Feoff-
ments 2. 7.
8, 9. 17.
29 H. 6. 43.
31 H. 7. 7.

rate persons, and out-lawed persons, albeit the King take the pro- Outlawed
fits of their lands, all these may make Feoffments, gifts, &c. and all persons.
these have capacity to take by such conveyances.

Perk. Sect. 186. A woman that hath a husband alone and by her selfe without Feme covert.
her husband, cannot make a feoffment of her own land and if she
doe so, it is void, albeit her husband agree to it.

Fitz. Feoff- & feoff-ments 29. Perk. Sect. 205. 224. 225. Neither the head alone, nor any one or more of the members of Corporation.
a Corporation aggregate of many alone may make a feoffment of
any of the land belonging to their corporation; But all of them
together may make a feoffment: and if any of them be seised of land
in his own right and in his natural capacity, he may make a feoffment
of this land as another man may doe; yea he may make a feoffment
of this land to the same corporation whereof he is a head or member
and so give and take also in a divers capacity.

Co. super Lit. 43. Ecclesiastical persons cannot make feoffments, gifts, &c. of their Ecclesiastical
ecclesiastical lands for longer time then three lives, or twenty one Persons.
years, for all feoffments, gifts, grants, and leases by Bishops, albeit
they be confirmed by Dean and Chapter, or by any of the Col-
ledges or Halls in either of the Universities or elsewhere, or by
Dean or Chapters, masters or gardians of any hospitalls, Parsons,
Vicars, or any other having spiritual or ecclesiastical living, are
avoidable.

Perk. Sect. 194. A man cannot make a feoffment to his own wife after the marriage Husband and
is consummate. But after a contract made, and carnal knowledg wife.
had, he may make a feoffment to her, and such a feoffment will be
good.

Perk. Sect. 197. Fitz. feoff- & feoff-ments 26. One Jointenant cannot make a feoffment of his part of the land Jointenants.
to his companion, for a man cannot give a possession to him that Tenants in
hath it before. And hence it is also that the lessor cannot make a common.
feoffment to his lessee for life, years, or at will. And yet perhaps a
feoffment in this case if it be in writing, may worke as a confirmati-
on. But one tenant in common or one coparcenor may make a
feoffment of his part of the land to his companion

Bro. feoff-ment 4. Perk. Sect. 222. If a man make a feoffment of anothers land, it is a dissein, but Dissein or and
a good feoffment against all men but the disseisee himself. And if Disseisee.
four join in a feoffment of land, and three of them have nothing in
the land, and the fourth hath all the estate; this is a good feoff-
ment.

Perk. Sect. 297. Co. super Lit. 48. 49. A disseisor cannot make a feoffment of the land to the disseisee,
but it will be void, for the disseisee will be remitted. But a disseisee
may make a deed of feoffment, and a letter of attorney to enter and
give livery; and if the attorney do so, this will be a good feoffment.

Fitz. feoff- & feoff-ments 23. No feoffment, or livery of seisin can be made to the King, for he
doth alwaies give and take by matter of Record.

A feoffment may be made at this day, of any thing which doth Prerogative-
lie.

2. In respect
of the matter
whereof it is
made,

lie in livery, by whatsoever tenure it be held, notwithstanding the Statute of *Magna Carta* cap. 32. But in some cases where a man doth alien his land held of the King, he must have the Kings licence before hand to doe it, or else he must pay a fine to the King afterwards for not having a licence. But of such things whereof no livery of seisin can be made, no feoffment can be made.

Co. super
Lit. 49.
21. H. 7. 7.
See infra
at Numb.
9. Grant 5.

One may make a feoffment of a moiety, third, fourth, or fifth part of his Manor or other land, and that by the name of a moiety, third, or fourth part.

Co. super
Lit. 190.

A feoffment may be made of an upper chamber over another mans house beneath.

Co. super
Lit. 48.

If there be a meadow of one hundred acres which time out of minde hath been divided amongst divers persons, and each person hath a certain number of acres, but in no certain place, the custome being to allot each person his number one yeare in one place and another in another *alternis vicibus*; in this case either of these persons may make a feoffment of his part by the name of so many acres lying in such a meadow without any bounding or describing of it.

Co. super
Lit. 4. 48.

If parceners have made partition of their land, that the one shall have it from Lammas to Easter to her and her heires, and the other shall have it from Easter to Lammas to her and her heires, or that the one shall have it one yeare and the other the other yeare *alternis vicibus*: Or if they have two Manors descended, and they agree that the one shall have the one Manor one yeare, and the other the other Manor the same year, and the next year that he that had the one shall have the other *alternis vicibus*, for ever; in these cases the parceners may either of them make a feoffment of this land or Manor.

Co. super
Lit. 4. 48.

3. In respect
of the pre-
sence or
possession of
other persons
on the land at
the time of
the feoffment
made.

If there be any lease for life or years in being of that land or thing whereof the feoffment is made, and he that hath this lease for life or years, or in his absence his bailife or servant keeping in the house or land whereof the feoffment is to be made doth give leave and agree that livery of seisin shall be given upon the house or land by the lessor himself or by his attorney, and for this cause doth leave the possession of the house or land, and thereupon livery of seisin is made; this is a good feoffment and a good livery of seisin, and yet it doth not prejudice the estate of the lessee. And if the lessor make a feoffment of the land to a stranger by assent or licence of the lessee the lessee then being on the land; this is a good feoffment. In like manner as it is, where the lessor doth enfeoffe a stranger to which the termor doth agree saving his terme: And if the lessor make such an entry upon the lessee for life or years as to put him out of possession of the house or land, and then he doth make a feoffment and livery of seisin of it, or if the lessor in the absence of the lessee his wife, servants and children enter upon the thing in lease and make

Co. 2. 32.
Dier 340.
18. Perk.
Sect. 321.
21. H. 7. 7.
perk.
Sect. 220.
46. E. 3. 36.
Bro. Feoff-
ments de
terre 68.
Co. super
Lit. 48. 49.
53.

a feoffment and livery of seisin thereof; in these cases there is a good feoffment to pass the reversion, for in these cases when the lessee for life or years doth reenter, the law doth adjudge this to be an attornment in law. But if a lessor will enter upon his lessee, and against his will (the lessee being still in possession of the land) make a Feoffment of the land and give livery; this is voyd and can never take effect as a Feoffment. And therefore if there be a conveyance made of a house and land thereunto belonging in lease, and the Feoffor come into part of the land, without the leave of the lessee, and there make livery of seisin of that part in the name of all the rest of the land, (the lessee himself, his wife, child, or servant being then upon any other part of the land, and especially if they be in the house) this is no good feoffment for any part of the land but void for the whole.* And yet if the lessee for years make an under-lease of part of the land to another, and the feoffor do him make a feoffment of this part, and give livery of seisin upon this part, in this case the possession of the first lessee in the residue will not hurt the feoffment or livery for this part, but it is a good feoffment. Also if the lessee give the lessor leave to make livery and depart and leave a servant of the lessee upon the land; in this case it seems his presence upon the land whiles the livery is made will not hurt. And so if the lessee leave the possession and leave nothing upon the land but his cattel; they will not keep his possession, nor prejudice the livery of seisin.

* Veynors
case. Trin.
7 Jac. B. R.

Co. super
lit. 48.

21. H. 7. 7.
Dier 18.

If a lease be made of one acre to one, and another acre to another, and the lessor make a feoffment of both these acres, and make livery in one of them in the name of both acres; this is no good Feoffment for the other acre. for by this livery he is not put out of possession of that acre. So if one make a feoffment of two Manors, the one in possession and the other in lease, and give livery of seisin of the Manor in possession in the name of both the Manors, this is no good Feoffment for the other Manor, neither will it pass by this Feoffment. So if one make a lease for years of a house, and after make a Feoffment in fee of the house and of a Close adjoining, and give livery of seisin of the house, the termors wife and Children being then in the house; in this case this is no good livery neither to pass the house nor the close.

Perk. Sect.
229.
Dier 362.

If lessee for life, or years make a Feoffment of the land, the lessor being then upon the land and not contradicting it; it seems this is a good Feoffment, and that the presence of the lessor upon the land, especially if he do not contradict it, will not hinder the virtue of the Feoffment as against the Feoffor and all others: but the lessor may enter afterwards for the forfeiture notwithstanding if he please.

Forfeiture.

Perk. Sect.
223.

If the husband alone make a Feoffment of the land he hath in the right.

right of his wife, or that he hath joyntly with his wife, his wife being then upon the land and disagreeing so it, in this case the feoffment is good against the feoffor and all others but the wife, notwithstanding her presence and disagreement, but the wife may after his death avoyd it.

Jointenant.

If one joynt tenant make a feoffment of the whole land, his companion being then upon the land; by this there doth pass no more but a moiety, and the feoffment is voyd as to the moiety of his companion, for the feoffment doth not give his moiety.

Pr. k. Sed.
230.

If a man enter into my land by wrong, and make a feoffment of it to a stranger, I being then upon the land; this feoffment is voyd, for in this case the law doth adjudge me to be alwayes in, and never out of the possession.

Perk. Sed.
3. 9.

Prerogative.

If the King have any possession of the land by wardship or otherwise, the owner of the land can make no feoffment of it. And therefore if the King be intituled to land by wardship, or premier seisin after office found, after the death of an ancestor of one of his tenants; in this case it is said the feoffment of the heir is void and passeth nothing, for the King is still in possession. And if it be before office found it will be all one, for the office shall relate to the death of the ancestor. And yet in these cases the feoffment is good against the heir himself, and all others besides the King. If the heir before office found, enter and make a feoffment, and then the King doth pardon the seoffee; in this case the feoffment is good. And yet such a feoffment after office with a pardon is void. And the like law is if the entry be before office, and the pardon after the office; for this is void also. But if a man be outlawed for debt or trespass, and thereupon the King hath the profits of the lands; in this case the owner may make a feoffment of this land notwithstanding.

Perk. Sed.
219. B. 10.
Feoffment.
3. 17.
21 H. 7. 7.
21 H. 6. 5.
1 H. 7. 5.
Stamf.
prer. Regis
40.

Outlawed persons.

4 In respect of the manner of making of it.

Reversion.

Divers persons cannot make a feoffment but it must be by deed, as corporations and such like: Also divers things cannot be granted by a feoffment, but the feoffment must be made by deed, for a feoffment cannot be made of a reversion of land, but it must be by deed. But a lease may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only. Also a feoffment may be made of the moiety, third or fourth part of a manor, or of a peice of land without deed. And yet if one be seised of a manor, whereunto an Advowson is appendant, and he make a feoffment of three acres parcell of the manor, together with the Advowson to two men, *Habendum* the one moiety with the Advowson to one of them, and the other moiety to the other; in this case the feoffment cannot be well made unless by deed.

Firs Fais
& Feoffo-
ments 32.
See Grant
vumb 4.

Lit. § 6.
60 super
Lit. 190.

If a lease be made for five years, on condition that if the lessee pay to the lessor within the two first years ten pound, then that he shall have

Lit. Sed.
250.

have the land to him and his heirs; or other wise but for five years; in this case livery of seisin be made to the Lessee before his entry, this is a good Feoffment. *Et sic de similibus ad modum.*

Every Feoffment also, whether it be made with Deed or without Deed, must be made with livery of seisin, and this livery of seisin must be made according to the rules of livery and seisin, herein after laid down, for this is of the essence of a Feoffment, and a Feoffment is not accounted perfect until livery of seisin be made; for until then the Feoffee hath only an estate at will in the land, and the Feoffor may put him out when he will. And if either of the parties die before the livery of seisin be made, the Feoffment is void; and no warrant of Attorney to make livery can be executed after the death of the Feoffor or Feoffee, neither is there any remedy in this case to get the assurance to be made perfect, but in a Court of Equity. But in case where there are many Feoffees, there the death of one or some of them will not hinder the livery, but it may be made to him or them that do survive, we must see therefore in the next place what this livery of seisin is.

Livery of seisin.

Equity.

5. Livery of seisin. Quid.

6. Quotuplex.

7. The nature and operation of it.

Lit. Sect. 59. 66. Co. super Lit. 52. Doct. & Stud. 31.

New terms of the law.

West. 2. part. symb. Sect. 251. Co. super Lit. 48.

Co. super Lit. 48.

Bro. c. states 4. Plow. 28. 29.

Livery of seisin, or giving of possession is a solemnity or overt ceremony required by Law, and used for the passing of lands or tenements corporal, as an evidence or testimonial of the willing departing by him that makes the livery from the thing whereof livery is made, and the willing acceptance thereof by the other party. And this is as ancient as a Feoffment, for no Feoffment is made without livery of seisin, albeit livery of seisin be sometimes made upon other conveyances. And it was first invented as an open and notorious act to this end; and that by this means the Countrey might take notice how lands do pass from man to man, and who is owner thereof; that such as have title thereunto may know against whom to bring their actions; and that others may know that have cause, of whom to take Leases, and of whom to require wardships, &c. And by this means if the title come in question, the Jury can the better tell in whom the right is. And of this livery of seisin there be two kinds. 1. A livery in Deed. 2. A livery in Law, called ballivum within house. The livery in Deed is when the Feoffor, Donor, or Giver by himself or another taketh the ring of the door of the house, or a turf, or a twig of the land, and delivereth the same upon the land unto the Feoffee; Doing, &c. in the name of seisin of the house, or seisin of the land. And this is done sometimes by the parties themselves if they be present, and sometimes in their absence by their Attorneys or probators. The livery in Law is where the Feoffor saith to the Feoffee being in view of the land, I give you yonder house, to you and your heirs; go enter into the same and take possession thereof accordingly, or the like. *plow. 28. in h. m. 211. ad 10. and 11.*

Because this manner of conveyance by Feoffment is so ancient, therefore

therefore this ceremony (being inseparably incident to a Feoffment) is much favoured in Law: And therefore it is expounded and taken strongly against him that doth make it, and beneficially for him to whom it is made. And for this cause it worketh not onely to transmit the present estate, but also to bar all present and future rights and Possibilities. If therefore one make a Lease for life to *I S*, the remainder to the right Heirs of *I D* (which *I D* is then living) and give livery of seisin according to the Deed; in this case albeit he in remainder be not capable of this remainder, yet by the livery it shall pass out of the Feoffor, and shall be in Abeyance during the life of *I S*. So if a Feoffment be made to one, & *hereditibus*, without the word [*seisin*] and livery of seisin be made of the Deed, this livery perhaps may make the estate good.

Co. 5. 93.
Lit. Sec.
70.
Co. 6. 26.
Doct. &
Stud. 13.
Co. super
Lit. 49.

8. wherein &
in what cases
it is requisite.
Or not.

Livery of seisin is needful, and must be had and made in all cases where any estate of Fee simple, Fee tail, or for a mans own or another mans life is made or granted by writing or word, in the Country, of any lands or tenements corporal. And so also where one doth make a Lease of land to another for years, the remainder to a stranger in Fee simple, Fee tail, or for life; in these cases livery of seisin must be had and made to the Lessee for years, or else nothing will pass to him in remainder; and yet the Lease for years will be good. And so also where a Lease for years is made upon condition that if such a thing happen the Lessee shall have the fee simple; in this case the Lessee must have livery of seisin before his entry, otherwise the estate will not encrease. And so also if the King make a Feoffment of the land he hath in the right of the Duchy of Lancaster, that is not within the County Palatine, in this case livery of seisin must be made as in the case of a Subject. And in all these cases where livery of seisin is requisite and it is not made, there doth pass no estate by the conveyance, but an estate at will at the most.

Co. super
Lit. 216.

Plow. 324
219.

But livery of seisin is not needful or requisite to be had and made in cases where any estate of Fee simple, Fee tail, or for life is made or granted of any lands by matter of record, as by the Kings Letters Patents, Fine, Recovery, Deed indented and inrolled, and the like; nor is it needful where any such estate is created by way of covenant and raising of use, by way of Exchange, Indowment *ad usum Ecclesie*, or *ex Assensu patris*; nor is it needful where any such estate is passed or granted by way of Surrender, Devise, Release, or Confirmation, or by way of increase or executory grant, as when the Fee simple is granted to the Lessee for life or years in possession; neither is it requisite or can be made where any incorporeal hereditaments, as reversions, rents, commons, or the like are granted in Fee simple, Fee tail, or for life: for in some of these cases there is an attornment to be made that doth

Co. 2. 21.
Lit. Sec.
59.
Co. super
Lit. 49.

supply

supply a livery. Neither is it requisite in some cases where an estate of freehold is made of a corporal thing; as if a house or land belong to an Office, and the Office be granted by Deed: In this case the house or land doth pass as incident thereunto. So if a house or chamber belong to a Corody; in this case by the grant of the Corody, the house or chamber passeth without any livery of seisin. Neither is it requisite upon a Lease for years, for if a man make a Lease for one thousand years; this Lease is perfect by the delivery of the Deed without any livery of seisin. Neither is it needful where one doth grant to me and my Heirs all the trees growing on his ground; for this will pass without any livery of seisin at all.

Co. B. 137.
11. 49.

Perk. Seel.
184.
Co. super
Lit. 48. 49.
52

Livery of seisin may and must be made either by the party himself that maketh the estate, or if it be a livery in Deed, it may in his absence be made by his Attorney sufficiently authorised by writing. And he that may make an estate, to the perfection whereof livery is requisite, may himself, and in his own right make livery thereupon, and in the right of another, and as Attorney to another; so divers that cannot make any estate, may notwithstanding make livery of seisin. And therefore the Husband albeit he may not make a Feoffment in fee, or Lease for life, &c. of land to his Wife, yet he may as an Attorney make livery of seisin to her upon a conveyance made by another. And so also may the Wife upon a conveyance made to the Husband or her. And so also Monks, Infants, Aliens, and such like persons disabled to make Feoffments, &c. may notwithstanding make livery of seisin, as Attorneys upon conveyances made to others. And so likewise may he in remainder in fee make livery to the Lessee for years. *Et sic de similibus.* And this livery of seisin may and must be made to the party himself that taketh the estate, or in his absence to his Attorney or Procurator sufficiently authorized: and in this case any one may be an Attorney to take, that may be an Attorney to give livery. If a Feoffment be made to divers by Deed, and livery of seisin is made to one or some of them; this is a good livery to execute the estate to them all. But if a Feoffment be made to divers without Deed, and livery of seisin is made to one or some of them in the name of all the rest; in this case the Feoffment is good to execute the estate in him or them to whom the livery is made, and as void to the rest. If a Lease for years be made to *A* and *B* without Deed, the remainder to *D* in fee, and livery of seisin is made to *A* or *B*; in this case this is a good livery to make the remainder to pass to *D*. But if a Lease be made for years to *A*, the remainder to the right Heirs of *I S* in fee, *I S* being then living, and livery of seisin is given to *A*, this remainder is void: for *nemo est heres viventis*. One Joyntenant cannot make livery of seisin to his companion as a Tenant in common may. And a Lessor cannot

9. How it may and must be made. And what shall be said in good Livery of seisin. Or not.

1. In respect of the persons that make it, and to whom it is made, and the quality of their estate.

Woman covert, Infant.

Co. super
Lit. 48. 49.

Dier 359.
Co. super
Lit. 49.
359.
Co. 5. 95.

Co. super
Lit. 217.

Perk. 40.
20 E. 4. 3.

2. In respect of the time when it is made.

make liver of seisin to his Lessee for life or years. See before *Nov. 4.*
In all cases where this ceremony is requisite, whether it be done by the parties themselves in person or their deputies, it must be done and made, 1. In the life time of the Feoffor, Donor, or Lessor, and in the life time of the Feoffee, Donee, or Lessee, for if either of them die, it cannot be done afterwards, neither can a warrant of attorney be made to deliver seisin after the death of the Feoffor, &c. But if there be more Feoffees, Donees or Lessees, then one, in such cases albeit all of them die but one, the livery of seisin may be made to that one that doth survive, and it will be good to him to execute the estate in all the land. And so it is if there be a warrant of attorney made by a Corporation aggregate, as a Mayor and Commonalty, Dean and Chapter, or the like, to give livery of seisin; in this case the death of the Mayor, &c. will not determine the authority, and therefore in that case the livery of seisin may be made after his death. 2. If it be a Lease for years with a remainder over in fee, the livery must be made to the Lessee for years before his entry, or at the time when he doth enter for that purpose; for afterwards it cannot be made. *Quod semel meum est amplius meum esse non potest.* *Quare* also, whether the Law be not so in all other cases, and let men take heed they do not (as commonly they do) enter into the land before they have livery of seisin made thereof unto them. And yet it seems the livery of seisin is good when it is made afterwards, by *Co. 2. 35.* 3. It must not be made before the estate begin: For if a Lease be made for years to begin at Michaelmas with a remainder over, and the livery of seisin is made before Michaelmas, this livery of seisin is void, for if a livery work at all, it must work presently, and so it cannot in this case, because it is before the estate doth begin.

Co. super
Lit. 52.

Co. super
Lit. 49. 116
Perk. Sed.
305.

Co. super
Lit. 117.

3. In respect of the place, or thing wherein it is made.

If an estate be made of divers pieces of land in divers Villages in the same County, in this case the making of livery of seisin of and in any part thereof in the name of all the rest, or of one parcel according to the Deed, albeit he doth not say in the name of, &c. sufficeth for all, if all the pieces be in the Grantors possession and out of Lease. But if the pieces of land lie in divers Counties, or in the same County, and they be in Lease, or out of the possession of the Feoffor, *contra*, for in that case the making of livery in one part in the name of all the rest, is not sufficient for the rest; for in this case it is requisite that livery of seisin be made upon and in some of the lands in both Counties, and upon every parcel of land that is out of possession, or at least in some parcel of the land in the occupation of every several Tenant. And yet if one part of a Manor be in one County, and the other part in another County in view of that part, in this case it seems livery of seisin in the one part in the one County in view of the other part in the other county, is good & suffices for all.

Co. super
Lit. 48.
Perk. Sed.
227, 228.
Doct. &
Stud. 3.
Lit. Sed.
611. 418.
Perk. Sed.
216.
Fitz. feoff-
ments &
Fain 111.

So if the scire of a Manor lies in one County, and the rest of the Manor in another County; in this case the making of livery in the scire of the Manor is sufficient for the whole Manor. If a Feoffment be made of the Manor of Dala in Sale, the which Manor doth extend in Dale and Sale, and livery of seisin is made accordingly in Dale only, and not in Sale also; by this Feoffment there doth pass no more of the Manor but that which is in Dale onely. If I be seised of one acre in fee, and of another acre for life, and I make Feoffment of both acres, and make livery of seisin in that acre whereof I am seised in fee, in the name of both acres; in this case it seems this sufficeth to pass both the acres. But if I be seised of one acre in fee, and possessed of another acre for years, and I make a Feoffment of both acres, and livery of seisin on that acre only whereof I am seised in fee in the name of both the acres, *contra*, for this is as if I make a Feoffment of land whereof I am seised, and of other land whereof I am not seised, &c. If I be seised of two acres of land, and let one of them for years, and then make an estate of both of them to another, and make livery of seisin in that I have in possession, in the name of both the acres, this will not serve to pass the other acre, but livery must be made in that acre also. And accordingly it was agreed in a case in the Kings Bench, *Hil. 38 Eliz.* which was, that a man was seised in fee of a Manor, and other Lands called Groves, and he made a Feoffment of it (Groves being then in lease for years) and a Letter of Atturney to give livery, and the Atturney made livery of the Manor in the name of the rest, the Lessee being still in possession of Groves; in this case it was agreed that this was no good Feoffment for Groves.

When a Feoffment is made of a house and land, the livery of seisin is most aptly to be made of and in the house, in the name of the rest, and at the door of the house, &c. And when a Feoffment is made of a Rectory or Parsonage, the livery of seisin may be made in the Parsonage house, or if there be no house it may be made upon the Glebe, or if there be neither, it may be made at the ring of the Church door.

In the making of every livery of seisin it is requisite that all persons that have any lawful estate and possession in the thing whereof livery is to be made, as Lessees for life, years, and such like joyn in the making thereof, or be removed thence, for every livery ought to bring an immediate possession to the Feoffee or Donee, &c.

If Lessee for years make a Feoffment and warrant of Atturney to give livery of seisin, and the Atturney make livery of seisin, the Lessor being present upon the land and not contradicting it, it seems this is a good livery of seisin.

The presence of the Feoffor, Donor, &c. upon the land after he hath delivered seisin to the Feoffee, Donee, &c. albeit he stay upon the

4. In respect of the presence or possession of others.

land

Perk. Sec. 221.

221. 7. 5. per Fro-wick.

Fitz. Faits & feoffments 2.

Mountagu versus Jester.

See infra:

See before Numb. 4.

Dier 361.

Bro. feoffments 24.

land a while, and do not depart and leave the Feoffee, &c. in possession, will not hurt the livery. See more *supra* Numb. 4.

3. In respect of the matter whereof it is to be made.

Livery of seisin may be made of any corporal thing, as Manors, Houses, Lands, Meadows, Pastures, Woods, Chambers or the like. And these things therefore are said to lie in livery. But of incorporeal things as Rents, Avoufons, Commons, Estovers, and such like things livery cannot be made. And these things therefore are said to lie in grant, and not in livery. And therefore when a livery is made of these, *nil operatur*. See more above Numb. 4.

Co. super
Lit. 49.

6. In respect of the manner and order of making it. And how livery of seisin is to be

To every good livery of seisin is requisite either such an act as the law doth adjudge to be a livery, or apt words that do amount unto it: for a livery may be good by words without any act or deed at all. But it cannot be good by an act or Deed without any words at all: howbeit that livery that hath an act or ceremony in it, is the best, because it taketh the deepest impression in the witnesses.

Co. 9. 137.
super Lit.
49.

The most usual, formal, and orderly manner of making of livery of seisin is thus, that the Feoffor, Donor, &c. and the Feoffee, Donee, &c. if they be present, or in their absence their Attorneys, or Servants that have authority, do come to the door, backside, or garden if it be a house, if not, then to some part of the land where seisin is to be delivered, and there in the presence of many good witnesses do shew the cause of their meeting, openly and plainly do read the Deed, or declare the contents thereof, and of the Letter of Attourney, if there be any. And then the Feoffor, &c. or his Attourney (if it be a house) do take the ring, latch or hasp of the door (all the people, men, women, and children being out of the house) or (if it be of a piece of ground) do take a clod of the ground, or a bough or twig of a tree, or bush growing thereupon, and (all the people being out of the ground) the same ring, &c. clod, bough, &c. with the Deed, do deliver to the Feoffee, Donee, &c. or to his Attourney: and in the delivery hereof do use these or some such like words, *viz.* I deliver these to you in the name of seisin of all the lands and tenements contained in this Deed. To have and to hold according to the form and effect of the same Deed. Or, I deliver you seisin and possession of this house or ground in the name of all the lands contained in the Deed according to the form and effect of the Deed. And then if it be a house, the Feoffee, &c. doth enter in first alone, and shut to the door, and then he doth open it and let in others. And if the Feoffment, Gift or Lease be made without Deed then they do and must withal expresse the very estate it self, which the Feoffee, Donee or Lessee is to have: As for example, the Feoffor, Donor, or Lessor, must come to the house or land which is to be granted, and where livery of seisin is to be made, and there must by apt words grant the house or land to him that is to have it in fee simple, or in tail, or for life (as the agreement is) and in seisin thereof must deliver

West.
Symb. 1.
part. Sect.
351.
Perk. Sect.
209, 210.
Co super
Lit. 48.

deliver him the ring of the door, or a turff or twig of the land. And if the Feoffment, &c. be made by writing, then it is wisdom to indorse and set down on the back of the same, how, when, and where the same is made, and the names of the witnesses thereunto. But a livery of seisin that is not so exactly made, may be good notwithstanding. And therefore if the Feoffor, Donor, &c. or his Attourney take any thing else that comes from off the land, as a stone, or the like, and therewithal doth make the livery of seisin; or if he take a turf, or twig from off another mans ground, and not from the same whereof possession is to be given, and deliver that upon the ground in the name of seisin; or if he take a piece of silver or gold, or a rod, stick, or the like, and deliver this upon the land in the name of seisin; all these are good deliveries of seisin and possession. So if the Feoffor, &c. be at the door of the house, or by the land, or in the house, or upon the land, and after he hath delivered the Deed, he say to the Feoffee, Donee, &c. [Here I deliver you seisin and possession of this house or land, in the name of seisin and possession of all the lands and tenements contained in the Deed] or [have and enjoy this house or land according to the Deed] Or [enter into this land or house, and God give you joy of it.] Or [I am content you shall enjoy this land] In all these cases there is a good livery of seisin. *Et sic de similibus.*

If I be seised of a house in fee, make a Feoffment of it, and of divers lands to a man then present with me in the same house, and there deliver him the Deed in the name of seisin of all the lands contained in the Deed; in this case this is a good delivery of the Deed, and a good livery of seisin also, albeit I continue in possession of the house still, and go not out of it. And if I be Lord of a Manor, and lying sick within some part of the Manor, I make a Feoffment of the Manor, and deliver the Deed to the Feoffee, saying to him I will that you take seisin presently; and thereupon command all my Tenants of the Manor to attune to him, and they do so; this is a good livery of seisin. So if I make a Deed, and after I have read it, being upon the land, I deliver it to the Feoffee, Donee, &c. and say, Here I deliver you this Charter as my deed, in the name of seisin of all the lands therein contained, or the like; this is a good delivery of the Deed and of seisin. But if I do onely seal and deliver the Deed upon, or in view of the land, without saying or doing any more, this will not amount to a livery of seisin. * And therefore if a man make a Feoffment with Letter of Attourney to give livery of seisin, and then he deliver the Deed upon the land, this is no good making of livery of seisin. And so also if there be no Letter of Attourney.

If I be seised of a house in fee, and being in the house, say to JS, Here JS, I demise you this house for term of my life; this will

Co. 9. 17.
Fitz. feoff-
ments &
saity 111.

Co. 6. 26.
41 E. 3. 17.

Bro. feoff-
ment 38.

Perk. Sect.
211, 212.

Perk. Sect.
215.
Co. 6. 26.

* Crom-
wells case
adjudged
in the Ex-
chequer
15 Eliz.

Co. 6. 26.

will not amount to a livery of seisin; and therefore it is no good Lease until livery of seisin be made, but it is a good beginning of a Lease.

If the Father infeoff his Son of land, and the Son suffer his Father to enjoy it, and after the son doth come to the Parish Church where the land doth lie, and there in the audience of the Parishoners useth these words to his Father, [Father you have given me such and such lands (and doth name them) as freely as you gave them to me, I give them to you again;] this is no good livery of seisin, neither doth any estate pass hereby. So if one being upon his land say to *I. S.* [*I. S.* stand forth, I do here reserving an estate to me for my own life, give this land to thee and thy heirs for ever;] this is no good livery of seisin, neither doth any estate pass thereby. So if one make a Charter of Feoffment to me, and make no livery of seisin thereupon, and after I make a Feoffment of the land to *I. S.* and the Feoffor hearing and having notice of it, saith [I do willingly agree to it, and am contented that *I. S.* shall have it] or I do agree to the Feoffment, or the like; in this case this doth not make the Feoffment that was made to me good.

If divers parcels of land be conveyed, and livery of seisin is made in one, or there be divers Feoffees, and livery and seisin is made to one of them according to the Deed, without using any more words; this is good. But the best form and order of making of livery in this case is to add these words, *In the name of all the rest &c.*

Livery in law,
or within the
view.

If the Feoffor, Donor, &c. deliver the Deed in sight or view of the land, and use these or any such like words, [I will that you shall enter into the land and have it, according to the Deed;] or, [take and enjoy the land according to the Deed;] Or, [I deliver you this Deed in the name of seisin;] Or, [enter you into the land and take seisin of it;] Or, [take the land and God give you joy of it;] Or (if the estate be made without Deed) [I give you yonder land to you and your heirs, and go and enter into the same, and take possession thereof accordingly;] Or, [enter into the land, and enjoy it in fee simple to you and your heirs, or for your life, &c.] in all these cases the estate and the livery is good, albeit the Feoffor, &c. stand in one County, and the land in view be in another County. But in all these cases of livery within the view, 1. It must be made by the person himself that doth make the estate, for it cannot be made by his Asturney. 2. There must be a relation to the land: For if the Feoffor do deliver the Deed onely to the Feoffee in sight of the land, this is not a good livery within the view. 3. The parties must stand within view of the land, for if the Feoffor, &c. being out of the sight of the land, say to the Feoffee, &c. Go and enter and take seisin of the land, and God send you joy of it; this is no good livery of seisin. 4. There must be some

body

Perk. 3ed.
216j

Hil. 27. E.
liz. & R.
Callards
case.

Fitz. Fait.
& feoff-
ments.

Co. super
Lit. 48.
Fitz. Eho-
pet. 177.

Co. 9. 137.
6. 26. super
Lit. 25. 34

1) New
terms of
the Law
Co. super
Lit. 48.
Dier 12.
2) 18 H. 6.
16.

3) Cosu-
per Lit. 48

5) Co. 1.
196. Perk.
Sec. 14.
Vita. fairs
& 1. feoff-
ments. 47.

body capable of a free Hold to take by the livery, for if it be made to a Lessee for years the remainder to the right heirs of *I S* and *I S* is then living it is void. 3 The Feoffee &c. must enter presently, for if either the Feoffor, Donor &c. or Feoffee, Donee, &c. die before entry; the livery cannot be made good. And yet if the party dare not enter for fear, in this case if he claim it onely, and do not enter it is sufficient.

Co. super
Lit. 52.
Celm. 51.
Co. 9. 76.
terms of
the law. tit.
Livery.

Livery of seisin in Deed, may be made or taken by the Deputies or Attorneys of the parties, and this livery by them is as good as that livery of seisin which is made by the parties themselves; and that also as it seems albeit the parties themselves be upon the land at the time of the making thereof if they do not contradict it. But in the making of this livery care must be had, 1. That there be a Deed of Feoffment, for otherwise a Letter of Attorney to deliver possession availeth nothing. 2. That there be a good authority in writing, which may be either in the Deed of Feoffment it self, * whether it be poll or indented, and that albeit the Attorney be not party to it, or else by a single Deed besides the Feoffment, &c. 3. That the Attorney do pursue his authority, at least in the substance and effect of it. 4. That the Attorney do it in the name of the Feoffor, Donor, &c. who doth give the authority. 5. That it be done in the life time of the parties. But a livery in law may not be made by an Attorney. And therefore if a Letter of Attorney be to deliver seisin generally, and the Attorney by vertue thereof deliver seisin in view; this livery of seisin is void.

* The opi-
nion there-
fore in Co.
super Lit.
52. 6. as to
this point
is held not
to be Law.

Pro. feoff-
ments 25.
Ass. pl. 4.
Perk. sect.
29.

If an Infant, or woman covert make a Feoffment and Letter of Attorney to make livery, and the Attorney do so; this is void, for they are not able to give such an authority. And if a man whiles he is of sound memory make a Feoffment with a Letter of Attorney to give livery, and after he become paralytique, and so dumb, but by signs he doth declare himself to be willing to have livery of seisin made, and it is made; this is a good livery of seisin. But if a Letter of Attorney be made to deliver seisin of certain land by one that is *de non sanæ memoriæ*, and the Deed of Feoffment was made whiles he was of sound memory, and afterwards he doth come to his memory again, and then the livery is made upon the first warrant without any new assent &c. in this case the livery is not good.

10. Where li-
very of seisin
made or taken
by an Attorney
shall be good.
And where
not. And what
warrant is
sufficient.

Infant. Wo-
man covert.

*De non sana
memoria.*

Bier 283.

That for the most part which for the manner and order of making it, is a good livery of seisin if it be made and taken by the parties themselves, is good being made and taken by their Attorneys or Deputies, that have a good authority, and do well pursue it. And therefore if the conveyance be made of divers lands, and they lie in one County, and a warrants of attorney is made to give livery generally, and the Attorney doth make it in one part of the land in the name of all the rest; this is a good livery. *Et sic de similibus.*

If a man be seised of black acre, and white acre, and he make a Deed of Feoffment of both these acres, and a Letter of Attourney to enter into both these acres, and to deliver seisin of both of them according to the form and effect of the Deed, and he doth enter into black acre, and deliver seisin *secundum formam carte*; in this case the livery of seisin is good, albeit he do not enter into both the acres, nor into one acre in the name of both. And if the Feoffment be made to two or more, and the warrant of Attourney is to make livery to them both, and the Attourney doth make livery of seisin to one of the Feoffees *secundum formam & effectum carte*: in this case the livery is good to both, and yet he that is absent may waive the livery.

Co. super
Lit. 52.

And yet if a man be disseised of black acre and white, and a warrant of Attourney is made to one to enter into both these acres, and to make livery, and the Attourney doth enter into one acre onely, and make livery of seisin there *secundum formam carte*: in this case the livery of seisin is void for all, for in this case he doth less then his authority. So if a man make a Letter of Attourney to deliver seisin to *I S* upon condition, and the Attourney doth deliver seisin absolutely: this livery of seisin is void. And so in all such like cases where the Attourney doth less then the authority and commandment, all that he doth is void. But for the most part where the Attourney doth that which he is authorised to do, and more also, it is good for so much as is warranted, and void for the rest. And therefore if the Letter of Attourney be to give livery of seisin to *I S* and the Attourney give it to *I S* and *W S*; this livery is good to *I S*, and void to *W S*. So if the Letter of Attourney be to give livery of seisin of white acre onely, and he make livery of white acre and black acre also: this livery is good for white acre, and void for black acre. So if the Letter of Attourney be absolute, and the Attourney give livery upon condition, some hold this to be good, and the condition to be void.

Co. super
Lit. 52.
258.
Perk. Sect.
187, 188,
189.

If a Letter of Attourney be made to two jointly, to make or take livery of seisin, and one of them alone doth it without the other, this is a void livery. But otherwise it is when it is made to two jointly or severally, for there one of them alone may do it.

Perk. Sect.
1. 9. Co.
super Lit.
258.

If a Letter of Attourney be to make livery of seisin after the death of another man, and the Attourney doth make livery of seisin during that mans life, this livery is void.

Co. super
Lit. 49.

11. How it shall
enure, and be
taken, and
constituted.

Livery of seisin is sometimes made single and without any relation to the Deed whereby the estate upon which the livery is made is created at all: and sometimes, and most commonly, it is made with reference to the Deed in these or such like words [*secundum formam carte*]. In the first case the estate is oftentimes made upon the livery, and then there may be one estate contained in the

Perk. Sect.
39.

Lit. Sect.
3. 9. Co.
super Lit.
48. 122.
Fitz. Eltop.
177. 78. 4.
25. Co. su-
per Lit. 49.
Fitz. Feoff-
ments, &
Deed, saits 23.

Deed, and another made by the livery, also: there may pass more land by the livery then is in the Deed; and by this means when there is a fault in the Deed, so that the land will not pass by the Deed, it may perhaps pass by the livery: but in this case then there must be apt words used in the making of the livery, to create the estate also, as well as to give the possession. But where the livery of seisin is made with relation to the Deed, there it must take effect according to the Deed or not at all, for these words *secundum formam carte*, are to be understood according to the quantity and quality of the effectual estate contained in the Deed. And therefore if one make a Deed of Feoffment to another, and in the Deed there is contained no condition at all, and when the Feoffor doth make livery, he doth make livery upon condition, or if the Deed contain an estate to him and his heirs, and he maketh livery of an estate in tail or for life; in these cases there doth pass nothing by the Deed. And yet if there be apt words used to create such an estate at the time of the livery made: such an estate may be made by the livery without the Deed, and then the Deed shall be void. But if in these cases the Feoffor say when he doth make livery on condition in tail, or for life, *secundum formam Carte*; in this case there is a good Feoffment made according to the Deed, and the additional words are void. So if a man make a Lease for years, and make livery *secundum formam Carte*, this is but a Lease for years still. And if *A* give land to *B* to have and to hold after the death of *A* to *B*, and his heirs, this is a void Deed; and therefore if the livery of seisin be made *secundum formam Carte*, the livery of seisin is void also. But if when he doth give livery of seisin, he give it to him and his heirs, without these words *secundum formam Carte*, &c. Or if in the making of livery he say, Here I deliver you seisin of this land to have and to hold to you and your heirs for ever, or the like, this may make a fee simple. And so if one make a Deed of Feoffment of two acres, and after make livery of seisin of four acres: in this case if there be words in the livery of seisin sufficient to make a new estate, the other two acres may pass also.

Co. 2. 55. If *A* by Deed give land to *B* to have and to hold after the death of *A* to *B* and his heirs, this is a void Deed: and therefore if upon this Deed livery of seisin be made before the day by the party himself, or at, or after the day by his Attorney *secundum formam effectum Carte*, the livery is void also, for it cannot enter so. And yet if a Lease be made for life, to begin *in futuro*, and at, or after the day come, the Lessor himself in person doth make livery of seisin *secundum formam Carte*: in this case the Lease perhaps may become good by this livery of seisin.

Co. super
lib. 222.

If an agreement be between two, that the one shall infeoff the o-
ther

ther upon condition for surety of money, and afterwards livery of seisin is made generally without any such condition; in this case it is said by some, the estate shall be on condition still.

If there be a fault in the Deed, as by the mis-naming of the Feoffor, &c. Feoffee, &c. or the like: and afterwards the Feoffor, &c. doth himself in person, make livery of seisin upon this Deed to the Feoffor, &c. by this the fault of the Deed may be hopen and cured. Perk. 362. 42.

If one make a Feoffment to himself and another, and give livery of seisin to the other, this is a good Feoffment and shall enure to the other wholly, and he shall take the whole by the Feoffment and the livery. And so if the livery be made to one that is capable, and to another that is not capable; he that is capable shall take the whole, and the other shall have nothing. So if a Feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the survivor; in this case the livery shall enure to the survivor only, and he shall have all the estate thereby. So if a Feoffment be made without Deed to a Corporation, and to J. S. and livery is made to J. S. alone; in this case J. S. shall have the whole, and the Corporation nothing at all. Perk. 362. 304. 203. 7 H. 7. 9.

If a Feoffment be made to four, and livery of seisin is made to one, two, or three of them; this shall enure to them all. But if the Feoffment be without Deed, it shall enure to him wholly to whom the livery is made. And if one of them give warrant to the rest to take livery for him, and they do so: this shall enure to them wholly, and not to him at all for any part. Dier 35. 10 E. 4. 11. Co. 5. 9.

If the Tenant make a Feoffment to his Lord and another, and give livery of seisin to the other; this shall enure wholly to the other until the Lord agree to it, and then to them both. 30 E. 4. 11.

If one make a Deed of Feoffment of one acre of land to A, and his heirs, and another Deed of the same land to A. and his heirs of his body, and deliver seisin according to the form and effect of both Deeds; in this case it shall enure by moities, i. he shall have an estate tail, and the fee simple expectant in the moiety, and a Fee simple in the other moiety. Co. super Lit. 21.

If two several Deeds of Feoffment be made to two several persons of one and the same thing; he that can get the seisin first shall have it. *Rem dominus vel non dominus vendente duobus, Injunctio prior traditionis prior.*

If Lessee for life make a Feoffment, and a Letter of Attorney to the Lessor to make livery, and he doth make livery accordingly; in this case this shall not enure to bar him of his entry upon the Feoffee for the forfeiture of his Lessee. But if Lessee for years make a Feoffment in fee, and such a Letter of Attorney to the Lessor, and he do deliver seisin accordingly; this livery shall bind him, for it shall be said as in his own right, because the Lessee had no free hold whereof to make livery. Co. super Lit. 51.

Co. Super
Lit. 52.

If a Lessor make a Deed of Feoffment, and a Letter of Attorney to the Lessee for years to give livery, and he doth it accordingly; this shall not be construed to extinguish or hurt his term. See more in *Exposition of Deeds, supra, ch. 5.*

And so we come to another kind of Deed of Common Assurance, called a *Bargain and Sale.*

CHAP. X.

Of Bargain and Sale.

Terms of
the Law
Plow. 30.
Co. 2. 35.

THis word doth signifie the transferring of the property of a thing from one to another upon valuable consideration. And herein onely it doth differ from a Gift; that this may be without any consideration or cause at all, and that hath always some meritorious cause moving it, and cannot be without it. This word also is sometimes applied to the assurance or conveyance whereby this is done and made which is called a Deed of Bargain and Sale; for this may be done by writing or without writing.

1. Bargain and Sale. *Quid.*

Terms of
the Law
Plow. 30.
Co. 2. 35.

And sometimes this is and may be of lands, tenements, and hereditaments, and to this the term is most properly applied. And then it is said to be, where a recompence is given by both parties to the Bargain. As where one doth bargain and sell his land to another for money; in this case the land is a recompence to the one for the money, and the money to the other for the land. And this now also is become one of the common Assurances of the Kingdom, * so that such an Assurance may now be averted to be fraudulent within the Statute of 27 Eliz., as well as any other assurance, a rent may be reserved upon it, or a condition made by it, as well as by any other kind of assurance. And sometimes this is and may be of moveable things, as Trees, Corn, Grass, Oxen, Kine, Householdstuff, and the like: the property whereof is and may be altered by this kinde of conveyance, as well as by gift or grant. And this kind of bargain and sale is that which is commonly called a Contract: which largely taken is an agreement between two or more concerning something to be done, whereby both parties are bound each to other, or one is bound to the other. But strictly it is the buying and selling of some personal goods whereby the property is altered. And in both these cases he that doth sell is called the Bargainor; and he to whom the sale is made, is called the Bargainee.

2. *Quotaplex.*

* Per Ch.
Just. Hide
3 Car.
Co. 2. 54.

Terms of
the Law
Agree-
ment.

Co. 2. 54.
3. 113. 3.
62.

The effect of this is to transfer the property, and this it will as effectually do as any other kinde of conveyance whatsoever. And thereore the Bargainee of a reversion howsoever he may not have bene-

Bargainor.
Bargainee.

3. The effect of it.

benefit of a condition upon the demand of a rent without giving notice of the Bargain and Sale to the Lessee. And howsoever if *A*. Conusee by a Fine of a reversion before Attornment of the Tenant, bargain and sell the reversion to *B*, that *B* cannot distrain for this rent, until he can get an Attornment of the Tenant; yet the Bargainee shall have benefit of a condition as an Assignee within the Statute of 3. H. 8. And it seems he may vouch by force of a Warranty annexed to the estate of the land, because he is in partly in the *per*, and partly in the *poss*.

4. Of what things a Bargain and Sale may be. Or not.

All things for the most part that are grantable, by any other way from one man to another are grantable, and may be transferred by way of Bargain and Sale from one to another. And therefore lands rents, advowsons, commons, tithes, profits of Courts, and the like, may be granted by way of Bargain and Sale in Fee simple, Fee tail, for life, or years. And all manner of goods and Chattels, as Leases for years, Wardships, Cattel, Corn, Householdstuff, Wood, Trees, Merchandises, and the like, are grantable by way of Bargain and Sale. But it seems Estovers, and such like things *de novo*, and that have not essence before, are not grantable by way of Bargain and Sale, as they are by way of Grant or Lease, and therefore that a Bargain and Sale of such things is void.

See Wob. Symb. tit. Bargain & Sale.

5. What shall be said a good Bargain and Sale. And what things are requisite to make such a Bargain and Sale. Or not. Of lands.

If any estate of Free-hold or inheritance be made of land by way of Bargain and Sale, the same must be made by a Writing or Deed indented, and cannot be made by word of mouth onely, as a Lease for years, whether it be created *de novo*, or be in *esse* before, may be. But lands in *London*, by a special Proviso within the Statute, may be bargained and sold by word of mouth, without any writing. 2. The very words Bargain and Sell, are not necessary to a good Bargain and Sale, for words equivalent will suffice to make land pass by way of bargain and sale. And therefore if a man seised of land in fee, do by Deed indented, and by the words Alien, or Grant, sell them to another, or if such a man covenant to stand seised of his land to the use of another, and these Deeds are made in consideration of money, and the Deeds be after inrolled; these will amount to good Bargains and Sales. And if a man by Deed indented and inrolled in consideration of ten pound paid to him by the words, demise and grant, pass his lands to another for twenty years; this is a good Bargain and Sale. 3. There must be some good consideration given, or at least said to be given for the land. And therefore if *A*. (for divers good considerations) or (in consideration that the Bargainee is bound for the Bargainor, and for divers other good causes) or (for divers great and valuable considerations) bargain and sell his land by Deed indented and inrolled to *B* and his Heirs; *nihil operatur*. But if in these cases in truth there be money or other good consideration given, albeit it be not expressed upon the Deed, the

6 Jac. B.R. Adjudged 11 H. 6. 43. per Yelverton. Stat. 27th. 8. ch. 16.

Co. 8. 94. 7. 40. 2. 36.

Co. 1. 176.

Ward versus Lambert Pasche 197 Eliz. 6. 61. EL. Adjudged. Dier 169.

the Bargainee may aver it, and being proved the bargain will be good. And if the Deed make mention of money paid, as in consideration of an hundred pound or the like, and in truth no money is paid, yet the Bargain and Sale is good. And no averment will lie against this which is expressly affirmed by the Deed. And if the Deed mention and say [for a certain sum of money] or [for a certain competent sum of money] these are good considerations. 4. There

needs no livery of seisin or Attornment in this case. And therefore if one bargain and sell a reversion by Deed indented and inrolled for good consideration; the reversion will pass without any Attornment of the Tenant. And if it be onely a Lease for years of a reversion that is granted, there needs no attornment nor inrolment. And in case of a Bargain and Sale, the Bargainee is in actual possession before any entry, so that the Lessee may attorn to the grant of the reversion, as hath been ruled in *Mittons* case, *Mic. 18. in Cur' Ward.* by the two Chief Justices and the whole Court. And yet I think he hath not such a possession as to bring any possessory action for trespass, or the like, until an actual entry; for where the Statute of 27 H. 8. of Uses provides, that the actual possession shall be adjudged according to the use, yet it ought to have a circumstance which is requisite by the Common Law, viz. an actual entry in Deed. But there must be an inrolment of the Deed in case where any freehold doth pass; for it is provided, That no lands (except in some Corporations onely) shall pass from one to another by any Deed, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons to be made by reason only of any Bargain and Sale thereof, except the same be made and done by writing indented, sealed, and inrolled in one of the four Courts [the Chancery, Kings Bench, Common Pleas, or Exchequer] or else within the same County or Counties, where the lands so bargained and sold do lie, before the *Custos Rotulorum*, and two Justices of the Peace, and the Clerk of the Peace of the same County or Counties, or two of them at the least, whereof the Clerk of the Peace to be one. And the same inrolment to be within six moneths next after the same Writing or Deed is dated. And this Statute was made in the same Parliament wherein the law of transferring of uses into possession was made, to the end that mens lands might not suddenly and privately pass upon payment of a little money in an Alehouse, or the like. And herein these things must be observed. 1. The inrolment upon such a Deed as to make this estate to pass, must be in parchment, for an inrolment in paper is not good. 2. The Deed inrolled must be indented, for if it be but plain, the estate will not pass. 3. It must be inrolled within six moneths of the purchase of sale. And this account must be, 1. From the date, and not from the time of the

Inrolment.²
Where necessary. And how it must be done.

delivery.

Dier 90.

Co. 7. 40.
8. 94.

Co. 5. 113.

But 27 H.
8. ch. 16.
Pl. 307.

*Co. 5. 1.

delivery of the Deed. 2. After twenty eight days to the moneth and no more. 3. The day of the date to be taken exclusive, and for none of the days of the six moneths. And yet if a Deed be inrolled the same day it bears date, it is good. 4. If it be inrolled any part of the last day of the six moneths, it is sufficient. And thus the Deed may be inrolled within the six moneths, albeit either of the parties die within the time. And if the Deed be not thus inrolled, it is of no force at all. So that if one bargain and sell his land to me, and the trees upon it; in this case albeit the trees might have been sold alone by Deed without enrolment, yet now being not inrolled, because the sale is not good for the land, it shall not be good for the trees also. And no subsequent act will help in this case; for if one by words of bargain and sell only, without any other words in the Deed, grant a reversion, and the Deed be not inrolled, and after the Tenant doth attorn; hereby nothing doth pass, neither shall it enure as a confirmation. But yet this must be noted, that in some cases where a Deed will not enure by way of bargain and sale for some of the causes aforesaid, it may enure to some other purposes. A bargain and sale may be made of goods and cattels, without any such solemnity, as before; for it may be by word as well as by writing, with or without any words of bargain and sell, as well as by those words, by a Deed poll, as well as by a Deed indented, and that without any enrolment at all, and without any delivery of any part of the things sold, or of any peice of money (as the manner is) in the name of feisin. But in this case also some respect is to be had unto the cause and consideration of the bargain, as well as in the case of the bargain and sale of lands: For howsoever perhaps in the case of a grant or bargain, and sale of goods or cattels by Deed in writing, the consideration is not material. And that if a man do by his Deed under his hand and seal bargain and sell timber, trees or any other thing without any consideration at all, the same may pass well enough; yet if the contract be by word, or by writing, sealed and not delivered, if there be no consideration, or no good consideration of it, it is of no effect at all. And therefore if a man by word of mouth sell to me his horse, or any other thing, and I give him or promise him nothing for it; this is void, and will not alter the property of the thing sold. But if one sell me a horse, or any other thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or all, or part of the money is paid in hand, or I give earnest money (albeit it be but a penny) to the seller; or I take the thing bought by agreement into my possession where no money is paid, earnest given, or day set for the payment; in all these cases there is a good bargain and sale of the thing, to alter the

Of goods and
cattels.

2) Dier
218.
Adjudy.
Fran kin
& Garter
case,
Mich. 37.
& 38. m.
4) Dier
218.
Ruled in
the Court
of Wards.
Co. II. 48.

Experie-
tis.

10. 108
11. 108
12. 108

plow. 108.

Dier 29,
10. 148.
11. 218.
8. 19. 98.
7. 6. 108.
7. 6.
Plow. 432.

pro-

propertie thereof; and in the first case I may have an action for the thing, and the seller for his money; in the second case I may sue for and recover the thing bought; in the third I may sue for the thing bought, and the seller for the residue of the money; in the fourth case where earnest is given we may have reciprocal remedies one against another; & in the last case the seller may sue for his money. If *A* sell cloth to *B* for ten shillings, and *B* takes away the cloth against the will of *A*, in this case *A* shall have an action of trespass against *B*. And if *A* sell cloth to *B*, for ten shillings in his election to make it a bargain or not, and if he will he may keep his cloth untill the other pay him, and if *A* say nothing, but doth suffer *B* to take it away; he may make it a bargain if he will, and bring an action of debt for his money. If I offer money for a thing in a Market or Faire, and the seller agree to take my offer, and whiles I am telling the money as fast as I can he doth sell the thing to another: Or when I have bought it, we agree that he shall keep it untill I can goe home to my house to fetch the money, in both these cases, especially in the first the bargains are good, so as the seller may not sell them afterwards to another, and upon the payment and tender and refusal of the money agreed upon, I may take or recover the things.

If one doe bargain and sell his land to me for money; To have and to hold to me generally, and doth not say to me and my heirs, by this I have but an estate for life and no more.

6. How a bargain and sale shall be taken.

If one in consideration of ten pound paid by me doth bargain and sell his land to me and my heirs, To have and to hold to me to the use to the bargainor for life, the remainder in tail to me, the remainder to the right heirs of the bargainor; this *Habendum* in this case is void, and I and my heirs shall have the land for ever.

Of lands.

If one in consideration of ten pound sell me land for the term of twenty years, and doth not say when this term shall begin; in this case it shall begin presently. See more in *Exposition of Deeds chap. 5. in toto.*

If one sell me any thing by the tod, pound, bushel, yard, or ell; it shall be accounted me assured, and reckoned according to the custome of the country and place, and not accord ng to the statutes or the measures of other countaries.

Of goods.

If one sell me twenty barrels of ale, or ten pottles, or cups of wine; by these bargains I shall not have the barrels, pottles, or cups; with the ale or the wine. But if one sell me a hogshead, or a firkin of wine, it seems by this bargain I shall have the hogshead and firkin with the wine.

If one sell me all his trees in such a wood, and that I shall not cut them untill *Michaelmas*; and in the interim hawks doe breed in the trees; it seems in this case that the vendor shall have them,

and

Co. 1. 87.
In et Lit.
10. Dier
159.
Dier 155.

Co. 6. 33.

Kelw. 87.
Plow. 140.
41.

Plow. 86.
27 H. 8. 27.
Bro. Con.
tra 4. 2

27 Aff. 29.

and that I may not meddle with them. And yet see *Co. Tl. 38*: which seems to be the contrary.

How and to what purpose a deed of bargain & sale of lands and the inrolment thereupon shall relate. And how and to what purpose it shall not.

The inrolment of a deed of bargain and sale, when it is done with in the six moneths, shall to most purposes relate to the time of the delivery, or of the date of the deed. And it is given as a rule, That it shall have relation to the time of the delivery of the deed, *viz.* to avoid all mean estates and charges made to a stranger by the bargainor after the delivery of the deed before the inrolment, but not to divest any estate lawfully settled in the interim in the bargainee himself. And therefore if one bargain and sell his land by deed indented to one, and after before the deed is inrolled, he enter into a statute, or grant a rent charge out of this land, or make a lease of the land to another, and then the deed is inrolled within the time; in this case the relation shall avoyd all the mean charges and estates. And if *A* bargain and sell his land by deed indented to *B*, and afterwards doth sell the same land by deed indented to *C*, and the deed made to *C* is first inrolled, and then the deed made to *B* is inrolled also within the six moneths, in this case *B* shall have the land, and the relation of his inrolment shall make the inrolment of the other deed void. So if *A* levy a fine of the land to *C*, yet *B* shall have the land. But if the first deed made to *B*, be not inrolled within the six moneths, and the deed to *C* be inrolled within the six moneths *contra*.

*Co. 4. 71.
Bro. tit.
Inrol. 9.*

*Dier. tit.
Curia Mar.
Iac. B. R.*

If *A* Bargain and sell land to *B*, and after levy a fine to *B* of the same land, and after within the six moneths the deed is inrolled; in this case *B* shall take by the fine, and not by the bargain and sale.

Co. 4. 71.

If one joyntenant alien all his lands in Dale to *A*, and before the inrolment the other joyntenant die, and after the deed is inrolled; in this case but a moiety and not the whole land doth passe.

*Bro. tit. }
inrol. 9. }*

Bankrupt.

If *A* bargain and sell his land to *B*, and after this *A* doth become Bankrupt, and the Commissioners sell the land to *C*, and after the deed is inrolled within six moneths; in this case *B* and not *C* the purchaser shall have the land.

*So held 4.
Car. B. R.*

Ward.

If *A* bargain and sell his land held *in capite* to *B* in fee, and *B* dieth before inrolment, and then the deed is inrolled; in this case the heir of *B* shall be in ward. And so was it held by all the Iustices in *Sir Walter Earls* case, *Pasch. 15. Iac. Curia Ward*. And yet in this case the wife of the Bargainee shall not have dower, as was held by *Anderson* Chief Iustice, and Iustice *Walmesley*, 3. *Iac. Co. B.* and again in *Sir Robert Barkers* case, 6 *Iac.* And if one bargain and sell his land to *IS*, and after this the rent incur, and then the deed is inrolled; the bargainee and not the bargainor shall have the rent.

*Pasch. 15.
Iac.*

*Contrari-
um tent.
per Iust.
Berkley.
Hil. 11.
Car.*

Dower.

Rent.

Per curiam B. R. Hil. 11. car.

If *A* bargain and sell his land to *B* in fee, and then marry *C* and die, and *C* is endowed, and after the deed is inrolled; in this case the

23 Eliz.

the dower of the woman shall be taken away by relation, as was held in *Bacon's case*, 22 *Eliz. C. 8*.

Jac. Co. B If *A* bargain and sell land to *B* and *C* in fee, and *B* release to *C* Release.
before the inrolment: this release is void.

So held in Mockers case, to El. If *A* disseisor bargain and sell the land disseised to *B* in fee, and the disseisee doth release to the bargainor, and after the deed is inrolled; in this case this release shall avail *B*.

6 Jac. If *A* bargain and sell his land to *B*, and *B* before inrolment doth bargain and sell the land to *C*, the first deed is inrolled, and then the second deed is inrolled; in this case the last bargain and sale is void, and shall not be made good by relation, as was held by the Court in *Sir Robert Barker's case*.

So was it held in Sir Christopher Hattons case. If a lease be made rendering rent on condition to reenter for not payment, and the lessor bargain and sell the reversion by deed intended, and after the deed made the rent is arrears, and then the deed is inrolled: in this case it shall not relate to give a reentry for the condition broken.

So hath it been adjudged. If *A* bargain and sell land to *B* in tail, and *B* before inrolment of the deed, doth make a lease according to the Statute of 32 *H. 8* and after the deed is inrolled: this is a good lease.

And now we come to a Gift.

CHAP. XI.

Of a Gift.

THis word importing no more then the transferring of the property of a thing from one to another, is of larger extent then *Gift. Quid* a Feoffment, which is alwaies applied to an immoveable thing; For this is often applied to moveable things also, as trees, cattel, household-stuff, &c. the property whereof is, and may be altered as well by gift, as by sale or grant. And in this sense a gift is sometimes by the act of the party, as when one man doth give a thing to another. And this is, or may be either by word or by writing. And sometimes it is by act of law, as when a woman is married to a husband, or one is made executor to another: in these cases by the marriage onely, and taking of the executorship the Law gives all the goods of the woman to the husband, and of the Testator to his executor. So where one doth take my goods as a trespasser, and I recover damages for them upon a suit in Law; in this case the Law doth give him the property of the goods, because he hath paid for them. But this word Gift is sometimes taken more strit-

Donor.
Donee.

ly and applied to a conveyance or passing of an estate of lands or tenements to another in tail, wherein this word *Do* is most commonly used. And then, he which doth so give the land is called the donor, and he to whom it is given the donee. And this for the most part is by deed, though it may be otherwise. And for these deeds of gift, of immovable or movable things, see *Deed* and *Grant in toto*, wherein all the learning touching this matter is involved. And so we pass to a *Grant*.

CHAP. XII.

Of a Grant.

Grant. *Quid*.

THis word taken largely is, where any thing is granted or passed from one to another. And in this sense it doth comprehend Feoffments, bargains and sales, gifts, leases, charges, and the like, for he that doth give or sell, doth grant also. And thus it is sometimes in writing or by deed, and sometimes it is by word without writing. But the word being taken more strictly and properly, it is the grant, conveyance, or gift by writing of such an incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed. Or it is the grant of such persons as cannot pass any thing from them but by deed, as the King, Bodies corporate, &c. And this albeit it may be made by other words, yet it is most commonly made by this word [grant] as being most proper to this purpose. Know therefore that amongst hereditaments, some are such as are said to lie in livery, *i.* such as whereof livery of seisin may be made, as Manors, houses, lands, &c. And some are such as do not lie in livery, *i.* whereof no livery of seisin can, nor need to be made, but they pass by the delivery of the deed without any more; and of this sort are rents, reversions, services, advowsons in gross, and the like, which things cannot pass from man to man without deed or matter of record, which is of a higher nature than a deed. And he that makes this grant, is called the grantor, and he to whom it is made, is called the grantee.

Co. super
Lit. 172. g.
Fiachelly
29.

Co. super
Lit. 49.

Grantor.
Grantee.

2. *Quomplex*.

It is taken here in the largest sense, as that which doth comprehend both. And so some grants are of the land or soil it self, and some are of some profit to be taken out of or from the soil, as rent, common, &c. And some are of goods and chattels, and some are of other things, as authorities, elections, &c. And they are made sometimes by matter of record, and sometimes by deed.

deed or writing in the country, and sometimes by word without either. Some grants also tend to charge the grantor with something he was not charged with before, and some to pass something out of him to the grantee, and some tend to discharge the grantee of some thing wherewith he was charged or chargeable before, and whereof he is now hereby discharged

Co. 1. 73. Plow. 555. Regularly these things are requisite in every good grant or gift. 1. That there be a grantor, donor, &c. and that he be a person able to grant, and not disabled by any legall or naturall impediment. 2. That there be a grantee, donee, &c. and that he be a person capable of the thing granted, and not disabled to receive it. 3. That there be a thing granted, and that the thing be such a thing as is grantable. 4. That it be granted in that order and manner that Law requireth: as where the thing is not grantable without deed, that it be done by deed. And if it be by deed, that the deed have apt words to describe and set forth the person of the grantor, and grantee, and thing granted, &c. and that all necessary circumstances; as sealing, and delivery, and livery of seisin, and attornment where it is needfull be observed. 5. That there be an agreement to, and acceptance of the grant or thing granted by him to whom it is made, & for default in either of these particulars a grant may be void. 3. Things necessarily requisite to every good grant.

Perk. Sect. 1.

Perk. Sect. 1. Regularly these things are requisite in every good grant or gift. 1. That there be a grantor, donor, &c. and that he be a person able to grant, and not disabled by any legall or naturall impediment. 2. That there be a grantee, donee, &c. and that he be a person capable of the thing granted, and not disabled to receive it. 3. That there be a thing granted, and that the thing be such a thing as is grantable. 4. That it be granted in that order and manner that Law requireth: as where the thing is not grantable without deed, that it be done by deed. And if it be by deed, that the deed have apt words to describe and set forth the person of the grantor, and grantee, and thing granted, &c. and that all necessary circumstances; as sealing, and delivery, and livery of seisin, and attornment where it is needfull be observed. 5. That there be an agreement to, and acceptance of the grant or thing granted by him to whom it is made, & for default in either of these particulars a grant may be void. *In acquirendo rerum dominio scilicet. quod donationes non valent licet sint incepta nisi sint perfectae.* But if grants be very ancient, and things granted have been enjoyed according to the grant ever since the making of it; in this case the grant may be good notwithstanding some legall defect in some of these particulars.

Pro. Grant 89.

Perk. Sect. 64. 4 H. 7. 17. Plow. 150. 16 H. 7. 3. Lit. Sect. 60.

Corporations as Dean and Chapter, Mayor and Commonalty, and such like regularly can neither grant lands, goods, or chattels but it must be by deed. But the grantees of such persons, and all other common persons may grant or give any thing which doth lie in livery, as manors, houses, lands, and such like things in fee simple, fee tail, for life, for years, or at will, by word without deed. And if a lease be made of any such thing for life or years, with a remainder over in fee simple, fee tail, or for life, it is good, albeit the same be done by word, without any deed in writing.

4. What shall be said a good and sufficient grant, gift, or sale. Or not. 1. For the manner of it. And what may be granted without deed. Or not. And how. Rents, Services, &c.

Co. Super. Lit. 49. Dier 439. Perk. Sect. 61. 60. 63. Bro. Grant. 59.

Such things as are said to lie in grant, and not in livery, generally cannot be granted or given, had or taken without deed, unless it be in some special cases. And therefore rents and services, and such like things which are in gross, and not incident to some other thing, may not be granted without a deed. And therefore if a rent-charge be granted unto me for years, I may not grant this rent over without deed. And if there be Lord and tenant of errable land by fealty, and the service of yielding the tenth sheaf of corn before it be sowed; the Lord cannot grant this service for

years without deed. But if a rent, or any service be parcel of, or incident to a manor or any other thing which is grantable without deed; in this case by the grant of the principal by word, this thing may pass as belonging thereunto without any deed. Also rents or services may be granted upon a partition by one coparcenor to another without deed.

Reversion or
Remainder.

A reversion cannot be granted in fee simple, fee tail, for life, or years without deed, unless it be in case where it is parcel of a manor. But a reversion may be granted upon a partition by one coparcenor to another without any deed. And the same Law is of a remainder. And therefore if one make a lease for life or years to one, the remainder in fee simple, fee tail, or for life, to another without deed, howsoever this be a good remainder in the first creation without deed, yet this remainder cannot be granted over without deed.

Perk. Sect.
61 Dier.
174.
Plow. 491.
Bro. Grant
104.

Advowson,
Tithes, &c.

A Parsonage or Rectory, albeit it consist of nothing but Tithes, and the like, besides the Church and Church-yard, and it hath no house nor glebe belonging to it, yet may be granted without deed in fee simple, for life, or years: and then the tithes and offerings will pass as incident. But the tithes alone, or a portion of tithes, oblations, mortuaries; or obventions are not grantable by themselves without deed. And therefore a lease paroll of tithes, albeit it be but for years, is not good. And if the Parson agree with one of his parishoners, that he shall have his own tithes; this is not a good grant of the tithes, neither may it be pleaded or used so; but perhaps by way of agreement a parishoner may retain his tithes. And if a lessee for years of tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron *Dinham*, 2. Car. at *Sarum* Assises. And yet it is held that a Parson may grant his tithes from year to year to him that is to pay them without any deed, but this is by way of retainer. But this grant or agreement must be made to and with the party himself that is to pay the tithe, and not with another: neither can this interest be assigned, or a stranger take advantage of it, as hath been agreed in the case of *Hawkes and Brasfield*, Pasch. 3. Jac. B.R.

15.H.7. 2.
16.H.7. 1.
19.H.7. 12.
21.H.6.
43.

All this
was a-
greed 34.
El. B.R.

Mich 9.
Jac. Dr.
Long-
worths
case.

An Advowson in gross cannot be granted without deed, yea the grantee of the grantee of an Advowson is to shew both the deeds. But an Advowson is grantable upon a partition between coparcenors without deed. And an advowson incident to a manor, or piece of land is grantable with the manor or land without any deed. The next avoidance to a Church is not grantable without deed.

22. Ed. 7.
38.
11.H.4. 14.
Dier 29.
10 Co. 11.

Plow 156.
9 Ed. 4. 17.

Common of
pasture, &c.

Common of Pasture, of estovers, turbary, fishing &c. cannot be granted in fee simple, fee tail, for life, or years, unless it be in case of partition, or of appendancy as incident to some corporal thing with-

Perk. Sect.
61.

without deed. And therefore if a man grant by word of mouth to me common for twenty beasts in his manor; this is not good. Neither if it be granted to me by deed, may I grant this over to another without deed. But if a man have common of pasture appendant or appurtenant to his land; in this case he may grant his land with the common appendant by word onely without any deed. Franchises, as Fairs, Markets, Courts, Warrens, and the like, or the profits thereof are not grantable without deed. But it seems a Hundred is grantable without deed, for that is *liberum tenementum*. The profits of a Mill, County, Ferry, Corody, or the like, are not grantable without deed.

Franchises
and such like
things.

Things in action, as a right or title of action that doth onely depend in action, and things of that nature, as rights and titles of entry to any real or personal thing are not grantable at all, but by way of release to the tenant of the land, &c. by which means it may be extinguished: but this may not be neither without deed. And therefore if a man take my goods as a trespassor, or I deliver him my goods to keep, and after I will give these goods to him, I cannot do this without deed.

Things in action,
on, and such
like things.

An election, condition, covenant, assent, licence, or liberty, cannot be created and annexed to an estate of inheritance or freehold without deed.

A privilege to hold land for life without impeachment of waste, Offices, is not grantable without deed. Offices for the most part are not grantable without deed. And yet some inferiour offices, as Stewardships, Bailiwicks, and the like are, for such officers a Lord of a Manor may retain by word without deed.

Most chattels real and personal, may be given and granted without deed. And therefore if a man by word of mouth grant, give, or sell me his lease for years, the wardship of body and land, or the wardship of land that he hath, by reason of a tenure by Knights service, or by grant from the King, or grant or sell me the trees standing upon his ground, the corn growing upon his land, his horse, sword, plate, or other household stuff; this is a good grant or gift. But the wardship of the body of an heir onely, cannot be granted without deed. So a next presentation cannot be granted without deed.

Chattels

If one grant his reversion of land to one, and by the same deed granteth a rent out of the same land to another, and delivereth the same deed to both of them at one time; this is good and shall enure first as a grant of the rent to one, and then as a grant of the reversion to the other.

If one convey land to another, and the grantee by the same deed doth grant a rent or common to the grantor out of the same land conveyed, this is as good as if it were by another deed.

By what words of grant.

Dedi & concessi be the most apt words for all kind of grants, yet it may be by other words, and the grant as good as by those words.

Co. super Lit. 35 H. 6. 111.

The best way in grants is to grant by words of present time in the present tense, as well as in the preterperfect tense. But a grant by words of the preterperfect tense onely, as by *Dedi & concessi* onely without words of the present tense, is good.

3. In respect of the person the grantor, &c. and the naming of him. And who may be a grantor. And how.

Touching this part two things are requisite. 1. That the grantor be a person able. 2. That if the grant be by deed, that he be sufficiently described and set forth either by his proper names, or else by some other matter of distinction. Note therefore that whosoever may be a Feoffor, may be a Grantor. And any natural, politique, or corporate body (not prohibited by Law, as Monk, Friar, woman covert, infant, and such like) may be a Grantor, Donor, &c. And the grants of such persons will be good.

See Feoffment, ca. 9. Numb. 4.

Perk. Sed. 3.

Alien.

An alien may, and is able to grant or give any thing that he is capable of to have or take by grant or gift.

Person attainted or outlawed.

A person attainted of treason or felony may give or grant his land and this is good against all others besides the King and the Lord of whom his land is held. And he may grant or give his goods to relieve himself in prison, and this will be good against all others, and the King and Lord also. A person outlawed in a personal action, may give or grant his goods or chattels, and the gift or grant will be good against all others but the King.

Perk. Sed. 26. See ch. 1. Numb. 6.

Woman-Covert.

The Queen may, without the agreement of the King, make grants, gifts, &c. of her lands or goods, but another woman that hath a husband cannot give or grant her lands or goods without her husbands consent, unless it be in some special cases. And albeit she do recite by the deed that she is sole and not covert, yet this will not help. And if the case be so, that by agreement between her and her husband, there be a certain portion of her husbands lands or goods allotted unto her to dispose of, and manage at her pleasure, yet she alone without her husband, can make no good grant or gift of any part of these lands or goods. But if she grant any thing by fine, and the husband doe not avoid it during the coverture, this Grant will bind her after his death. And if she make a gift or grant of her husbands goods, it is thought this is not good until her husband agree to it.

Co. super Lit. 3. Perk. Sed. 8. 29. 41. See ch. 3. Numb. 6.

An infant cannot make any gift or grant, &c. that is good, but in special cases: for if he maketh any grant or gift that taketh effect by the delivery of the deed onely, as if he grant a rent-charge out of his land, or make a Feoffment with a letter of Attourney to give livery of seisin, or give or sell his horse, and the buyer or donee take him himselfe, these are void *ab initio*. And if the grant or gift take effect by the delivery of his own hand, as if he make

9 H. 7. 24. 26 H. 8. 20. Perk. Sed. 12. 13. 14. 19. 9 H. 4. 5. See ch. 2. Numb. 6.

make a Feoffment and give livery of seisin himself, or sell a horse and deliver him with his own hands; this is voidable by the Infant himself, or others that shall have his Right, &c. But if an Infant grant any thing by fine, this must be avoided during his minority, or else it cannot be avoided at all.

Perk. Sec. 16. All grants that are made by Dureffe, are voidable by the parties themselves that make it, or others that have their estates, &c. But if it be done by fine, it is good and unavoidable. Dureffe. 12

Co. 123. 124. See cap. 2. Mumb. 6. All gifts, grants, &c. made by deed in the Country, by those that are *de non sane memorie*, are good against themselves, but voidable by those that are their heirs, executors, or have their estates. But if it be by fine, it is good and unavoidable. Non sane memorie.

Perk. Sec. 35. A man that is born dumb, or dumb and deaf, if he have understanding; may by delivery of the deed and making of signes, make a good grant, gift, &c. But a man that is born deaf, dumb and blind cannot.

Perk. Sec. 30. A Bastard may give or grant as well as any other man, after he hath gotten a name by reputation. Bastard.

See Lease. A Parson may grant any thing belonging to his Parsonage for no longer time then for his own life, and therein likewise but during his residence, albeit he have the consent of the Patron and Ordinary. Parson. 7

Perk. Sec. 31, 32, 33. Neither the head without the members of a Corporation, nor the members without the head, as Dean without the Chapter, or Chapter without the Dean, may give or grant any of the lands belonging to their Corporation. Corporation.

See Executors. One Executor or Administrator may give or sell any of the goods of the deceased, and this is good to bind all the rest. Executors.

What Grants Ecclesiastical persons may make of their Ecclesiastical lands, husbands of the lands of their wives, and tenants in tail of their lands intailed. See in *Lease*.

Co. 4. 63. Super Lit. The name of the persons in Grants is set down onely to distinguish persons, and to make the person intended certain: and therefore howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his Surname; and if it be a Corporation, by the true name whereby the Corporation is made, yet mistakes in this case, unlesse they be very grosse, will not make void the grant, *Nihil facit error nominis cum de corpore constat*. And therefore if one that is a bastard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common esteem then his own right name, or is usually called by another name then his true name in the place where he lives, in these cases they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another; some have said he may grant by either Misnaming. 1

Perk. Sec. 41. Co. Super Lit. g. where he lives, in these cases they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another; some have said he may grant by either

of these names, *Sed quare*. And if *John* at *Stile* grant by the name of *William* at *Stile*, this grant is good. *Et sic de similibus*. ^{Perk. scd. 39.} And these grants are good especially when there is some other addition to make it more certain, as when a Duke, Marquess, Earle, or Bishop grant by their names of honor or dignity, and grant without any name, or with a false name of baptism, as when the Duke of *Suffolk* by the name of the Duke of *Suffolk*, without any more words, or by the name of *William* Duke of *Suffolk*, when his name is *John*, or the Bishop of *Norwich* grant so; these are good grants, because there is but one such Duke and one such Bishop within the Kingdome. So if a Dean and Chapter, Mayor and Commonalty, grant by the name of their Corporation without any addition of Christian or Sirname; it is good. And especially then also are these grants good when the true name doth appear in some other part of the deed. As when *John* at *Stile*, reciteth by his deed, that his name is *John* at *Stile*, and by the same deed doth grant by the name of *Thomas* at *Stile*. Or *Alice* at *Stile* reciting by her deed that she is a feme covert when in truth she is sole. But if an ordinary man grant by his Sirname only without any name of baptism, or by his name of baptism without any Sirname at all: in these and such like cases for the most part, the grant will be void for uncertainty, unless there be some other matter in the deed to help it, or some matter done *ex post facto* to supply it; for in some cases where the thing granted doth lie in livery, such a mistake or uncertainty in the grant may be holpen by the livery of seisin upon the deed afterwards. And so also it is in the names of Corporations; for if the variance and mistake by omission or alteration be only in some small matter, so as it is literal and verbal onely, the grant will not be hurt by it. But if the mistake or omission be in the substance of the name; the grant may be void by it. And therefore if *Decanus & Capitulum Ecclesie cathed. sancte & individ. Trin. Caerlis.* grant by the name of *Decanus ecclesie cathed. sancte Trin. in Caerlis. & totum capitulum ecclesie pradi.* this is good: *Et sic de similibus*: for if the sense do still remain either expressly or by necessary implication, and the description be such as doth import a sufficient and certain demonstration of the true name of the Corporation according to the foundation thereof, it sufficeth. But if any of the substance or essence of the name be omitted *contra*. And therefore if a Corporation incorporate by the name of *Propositi & collegii regalis coll. beate Marie de Eaton, juxta Windsor* grant by the name of *Preb. & sociorum Colleg. regalis de Eaton, &c.* leaving out *Collegium & beata Maria*; this grant is void. ^{Co. super Lit. 23. 3. Perk. scd. 42.}

a 3. In respect of the grantee and the naming of him; and who may be a grantee, &c. and how

a Touching this part three things are requisite. 1. That the grantee be a person capable. 2. that he be a person in being at the time of the grant made, and not disabled by any legal impediment

Perk. scd. 40.

2 H. 6. 26. Perk. scd. 38. 42.

Co. 6. 65. 10. 132. 11. 19. Dier 110. Co. 10. 124.

Co. super Lit. 23. 3. Perk. scd. 42.

See in scd. 9. Numb. 4.

ment to take by the grant: 2. That if the grant be by deed the grantee be sufficiently named, or at the least set forth and distinguished by some circumstantial matter, and that he be so named or described, as that he may be capable by that name whereby he is set forth. 3. That he himself and not a stranger doth take by the same grant. Note therefore that all natural and politique, or corporate bodies that are not disabled by Law, may be grantees: And all persons that may be grantors, may be grantees, and some others that cannot grant or give, yet may take or receive. And a grant made to one, two, three, or twenty such persons is good. A grant of land; or rent in possession to the right heirs of *I S*, *I S* being then living is void, for there is nor can be any such person in *terminis naturæ*, for no man can be an heir to another that is living. But such a grant to one in remainder is good, if so be that *I S* die before the particular estate end, and before the remainder happen: So if a grant be to him or her that shall be the first child of *I S*, and he have no child at the time of the grant, this is void. So if a grant be made to the wife or child of *I S* when there is none such, it is void. As if a grant be to *I S*, and to his first born sonne, or to *I S* and her that shall be his wife, and he hath at the time of the grant neither wife nor son; in these cases the grant is void as to the wife and son, and *I S* shall have all by the grant.

Co. 1. 801.
Perk. Sect.
52. 54.
Co. 2. 31.

Co. super
lit. 2.

Perk. Sect.
48.

Perk. Sect.
48.
Co. super
lit. 2.

Perk. Sect.
48.
Co. super
lit. 2.

Co. Idem.

Co. Idem.

Co. Idem.

An alien may be a grantee, but if any thing be granted unto him, whereof he is incapable, as an estate of lands in fee simple, for life or years, he cannot hold it, but the King will have it from him.

Alien.

A person attainted of treason or felony before or after attainder may be a grantee, but he cannot hold the thing granted; for if the King or Lord will, he may have it from him. So also persons outlawed in personal actions may be grantees of lands or goods, but the King will have the profits of the lands, and property of the goods.

Prerogative.
Persons at-
taint.

A woman covert may be a grantee, but her husband may by his disagreement avoid the grant. And yet if he do not avoid it in his life time the grant will be good: and he that will have the grant to be void, must shew that the husband did disagree to it.

Woman coi-
vert.

An Infant may be a grantee, for this is presumed to be for his advantage, and yet at his full age he may agree to it and perfect it, or disagree to it, and avoid it without any cause shewed.

Infant.

A man *de non sane memorie* may be a grantee as well as any other man, and it seems these grants cannot be afterwards avoided. But such men may not be grantees of offices of trust and such like things.

Men *de non*
sane memorie.

A Bastard, persons deformed having humane shape, leapers, and such like may be grantees of lands or goods, &c. as other men may be.

An Hermaphrodite may be a grantee according to the most prevailing Sex:

Hermaphro-
ditic.

A

Clerk Con-
vict.
Villain.

A clerk convicted, and a man imprisoned may be a grantee as well as any other. And so also may a villain of the King, or of a common person, but he cannot retain the thing granted, for the King or Lord may take it from him if he will. But Monks, Friars, and such like persons cannot be grantees, for they are utterly disabled.

Co. super
Lit. 3.
Perk. Sect.
48 51.

Misnaming or
not naming.

Regularly it is requisite that the grantee be named by his names of Baptism and Surname, and so it is most safe, and special heed must be taken to the name of Baptism, for that a man cannot have two or more names of Baptism, as he may of Surnames. And yet in some cases, though the name be mistaken the grant is good. As if a grant be to *J. S.* and *Em* his wife, and her name is *Emelin*, or a grant is made to *Afrid Fitzjames* by the name of *Eseldred Fitzjames*, or a grant be to *Roberts* Earl of *Pembrook* where his name *Henry*; or to *George* Bishop of *Norwich* where his name is *John*; or a grant be to a Mayor and Commonalty, or a Deane and Chapter, and Mayor or Dean is not named by his proper name; or a grant be to *J. S.* wife of *W. S.* where she is sole; all these and such like grants are good, for in this case, the rule doth hold *utile per inutile non vitiatur*. And if one be baptized by one name and after confirmed by another, yet a grant to him by his first is good. And so also some think of a grant to him by his second name. See *Quere* of this. Also when a Bastard hath gotten a name by reputation, a grant may be made to him by that name, and it is good.

Co. super
Lit. 3.

Bro. Nos.
me p.
Bro. Con-
firmation
30.
Co. 6. 65.
27 E. 3. 5.
Co. super
Lit. 3.

Dier 119.

Co. super
Lit. 3.

If a grant be made to *W.* at *Stile*, by the name of *W.* at *Gappe*, this is a good grant notwithstanding this mistake.

9 E 4. 41.
Fitz.

But where a grant doth intend to describe the person of the grantee by his proper name, and doth omit or mistake his christian name or surname; in this case for the most part the grant is void unless there be some special matter to help it, as in the case before. And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the second sonne, or to the youngest sonne, or *Seniori puero*, or *omnibus filiis*, or *filiabus*. *I. S.* or *omnibus liberis*. *I. S.* or *omnibus exilibus*. *I. S.* or to the right heirs of *I. S.* or to the next of blood of *I. S.* in these cases grants made to these persons in these words are good, for the person is certainly enough described. And if a lease be made to *I. S.* for life, the remainder to him that shall come first to Pauls such a day, or to him that *I. S.* shall name in three daies; if in these cases any one doe come to Pauls that day, or be named by *I. S.* within three daies, and the particular estate doth so long continue, this is a good grant of the remainder. *Id certum est quod certum reddi potest*. But if a grant be made

Grant. 23.
Co. super
Lit. 3.
Perk. Sect.
54.
Bro. Grant
65.
Done 17.
Dier 237.
Perk. Sect.
55-56.
Bro. Done
31.
G. ant 172.
Done 50.
Fitz. Do-
ne.
Perk. Sect.
55-56.

Uncertainty.

in these words, *viz.* To four of the parishoners of Dale, or *Des & ecclesia de D*; or to two of the sons of *I S*, and he hath many sons, or to *I S* or *W S* in the disjunctive: these and such like Grants as these are utterly void for incertainty. And if a gift or grant of goods be to the parishoners of Dale in these words, it seems this is good: but if a grant or gift of land be made to them by these words, it seems this is void. And so also it is of a grant of goods to the Churchwardens of a parish, this is held to be good but otherwise it is of a grant of lands to them. A bastard is capable by that name whereby he is usually called, and therefore a grant to him by that name is good. And a right heir, or one that shall be the first issue of *I S* that hath no child, is capable of a remainder by that name, but of land in possession he is not capable by that name. And a bastard as the reputed son of *I S* may take by a grant to *I S* and his issue. A Bishop may take by the name of a Bishop without any other name. But if a grant be made to the parishoners or inhabitants of Dale, or *pro his hominibus de Dale*, or to the commoners of such a waste, or to the Lord and his tenants bond and free; these are not good grants: for albeit these persons are capable, yet they are not capable by these names.

If there be two grantees, and one of them do take by the deed, it is sufficient, but if the grant be to one that is no party to the deed; and not to the grantee himself; in this case albeit the grantee and he to whom the grant is made be capable, and never so well described by their names, yet is the grant void; for no grant can be made, but to him that is party to the deed, except it be by way of remainder. And therefore if a man make a lease for term of life, and after the lessor grant to a stranger that the tenant for life shall have the land to him and his heirs: this Grant is void. *Et sic de similibus.* And yet it seems in some cases, if one of the grantees be party to the deed that another Grantee that is no party to the deed, may take with him. And therefore the case was, *Robert* gave the reversion of lands which *Agnis* his wife did hold for her life to *Stephan de la Moore, Habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*: in this case it was adjudged that albeit *Joane* was not named before the *Habendum*, yet that she should take in tail with her husband.

Touching this point these things are requisites. 1. That the thing whereof the grant is made be grantable, and that both in respect of the nature of the thing it self; and also of his estate that doth grant it, for in some cases albeit the thing for the quality of it be grantable, yet in respect of the estate and property that the owner hath in it, it is not grantable. 2. That if it be by deed, it be sufficiently distinguished and named.

Amongst things that are grantable, some are grantable *de novo*, and

4. In respect of matter touching the thing granted, charged, &c.

Doct. & Stud. 94.
Co. 1. 15.
Super Lit.
231.
New terms of the Law.
251, 252.
5 E. 3. 17.
Co. Super Lit. 21.

1. In respect
of the nature
of the thing
granted.

And what
things are
grantable.
over or charg-
able. Or not.

2. In respect
of the nature
of the thing
itself.

and in their first creation, but not transmissible nor assignable afterwards. And some are grantable at first in their original creation, and assignable over afterwards from man to man *in infinitum*.

All things that may be granted by fine, and whereof a fine may be levied may be granted over from man to man.

All things that are before observed to be grantable, by or without deed are grantable over from man to man. And therefore all corporal and immovable things that lie in livery, as Manors, messuages, cottages, lands, meadows, pastures, woods, and the like, are grantable in fee simple, for life, or years at first, and assignable over again at the pleasure of the grantee. Also trees, and emblements are grantable. And a man may grant the vesture or herbage, i. the grass of his ground, and not the ground it self. And a man that is seised in fee of a house, may give or sell the timber, stone, &c. of the house, and the donee or grantee may take it after the death of the donor. Also all incorporeal things that lie in grant, as rents, services and the like are grantable over in fee simple, for life, or years, and therefore rents or services reserved upon any estate, and rents granted out of land are grantable over *in infinitum*. And if a man have a rent reserved on a particular estate, he may grant over parcel of it. But a rent or service suspended cannot be granted. Neither can a man grant a rent issuing out of a rent. If a rent be granted to me, I may grant it over to a stranger before I be seised of it; and this grant is void. But an annuity it seems is not grantable over after the first creation of it. And yet if an annuity be granted to *I S.* and his assigns *pro consilio*; it seems this annuity is grantable over. Advowsons are grantable in Fee simple, for life, or years, from man to man *in infinitum*. Also the presentation to a Church before the Church is void is grantable: but when the Church is void, that turn is not grantable, for it is then in the nature of a thing in action. Also Rectories, and tithes, and portions of tithes, and pensions are grantable from man to man *in infinitum*.

Reversions and remainders are grantable from man to man in fee simple, fee tail, for life or years. And if I have a tenant for life of 3. houses, I may grant the reversion of 2 of them. And if I have the reversion of 3 houses and 4 acres of land; I may grant the reversion of 2 houses and of 2 acres of land. And if tenant in tail be of an acre of land the remainder to his right heirs, he may grant over this remainder by it self; and yet it is such a thing as the tenant in tail himself may barre by a common recovery. But if a grant be of land to *I S* for years, the remainder to the right heirs *T D.* and *T D.* is living; this remainder is not grantable so long as *I D* doth live. Common of pasture, of turbary, of fishing, of estovers, are grantable in fee, for life or years, from man to man *in infinitum*. And yet if a common in gross and without number be granted to a man and his

See Fine
N. 113. 6.
part 1.
Second ex-
position of
the terms
of Grants.
Supra c. 5.
Numb. 15.
Bro. Done
10.

Perk. Sed.
1. 3. Edo.
8 ant 3.
3 H. 6. 20.
9 H. 6. 12.
Perk. Sed.
91. 87. 101.
Fitz. grant
145.
Co. super
Lit. 144.

S. ar. 32 B.
8. cap. 7.
Perk. Sed.
90.

Perk. Sed.
73. 88. 89.

Perk. Sed.
103.
* Per 2.
Judges a-
gainst one
Hil. 16 Jac.
B. R.

Rents, Servi-
ces.

Advowsons,
&c.

Reversions
and Remain-
ders.

Common.

his heirs; it seems this is not grantable over to another man. But if common for a certain number of beasts be so granted; it seems the law is otherwise, and that this is grantable over in case where the first grant is to the grantee onely, and not the grantee and his assignes.

Offices.
Prerogative.
 Offices are grantable at first; but the great Judicial offices of the Kingdome, as the offices of the Lord Keeper, Chief Justices, or Chief Baron, or of other of the Justices and Barons, and such like, are not grantable over to others, neither may they be executed by Deputies. But the Sheriffs office albeit it be not grantable over; yet it may be executed by Deputy. The reversion of an office is not grantable by a Subject as it is by the King, yet a Subject may grant an office *Habendum* after the death of the present officer; and this is good. The inferior offices also that are offices of trust, especially if they concern the person of the grantor, howsoever they are grantable at first, yet are they not grantable over by the officer to any other, unless they be granted to them and their assigns, and of this sort are the offices of Steward, Bailiff, Receiver, Sewer, Chamberlain; Carver, and the like, neither may these be executed by Deputy but where the grant is so.

Licences, Authorities, &c.
 Licences and authorities are grantable at first for the lives of the parties or for years. But the grantees of them cannot assigne them over. And therefore if power be given to me to make an award or livery of seisin; I may not grant over this power to another. And if licence be granted to me to walk in another mans garden, or to goe through another mans ground; I may not give or grant this to another.

Possibilities.
 A bare possibility of an interest which is incertain, is not grantable. And therefore if one have a term of yeares in land, and by his will devise it to *I S* for his life, and afterward to me for the residue of the yeares, or devise it to *I S* if he live so long as the term shall last; and if he die before the term end, the remainder to me: in these cases so long as *I S* doth live, I cannot grant over this possibility. So if a lease be made to me and my wife for life, the remainder to the survivor of us; I may not grant this remainder over to another man. But such a possibility being coupled with some present interest, is grantable over; and therefore if *A* have four houses in execution upon a Statute, and by course of time it will endure thirteen yeares, and after two of the howses are evicted by Elegit for fifteen yeares; in this case he that hath this execution upon the statute, may assigne over his interest in these two houses: for after the execution by the Elegit is satisfied, *A* shall have the two howses again untill he be satisfied. The Lord cannot grant the wardship of the heire of his tenant whiles the tenant is living.

Those things that are inseparably incident to others, are not grantable.

Incident.]

grantable without the thing to which they are so incident and belonging. And therefore a Court Baron which is evermore incident to a Manor, is not grantable without the Manor it self; common appendant to land is not grantable without the land it self to which it doth belong: and common of estovers appendant to a house, is not grantable without the house it self to which it doth belong.

Peck. Sed.
104.
H. 7. 7.

Suspended things.

A rent, service, or other thing, whiles it is wholly in suspense, is not grantable. And therefore if the Lord disseise the Tenant, or the Tenant infeoffe the Lord upon condition; the Lord cannot grant over the Seigniori during this suspension. But if one have a rent in fee out of my land, and he purchase the same land for life or years; in this case it seems the rent is grantable even whiles the estate of the land doth continue. So if the tenant make a lease for years, or life of the tenancy to the Lord; in this case the Lord may grant the Seigniori notwithstanding. And yet if the tenant make a lease to another man for life, and the Lord grant the Seigniori to this tenant for life in fee; in this case it seems the grantee of the Seigniori cannot grant it over, because it was never in offe.

16 H. 7. 4.
Co. super
Lit. 314.
Bro. Grant.
173.
Peck. Sed.
83. 89.

Franchises.

Franchises, as views of Frank-pledge, Perquisites of Courts, Leets, Conusance of Pleas, Fairs, Markets, goods of felons, waifs, elstraves, Hundreds, Ferries, or Passages, Warrens, and the like, are grantable over from man to man in fee, for life or years, *in infinitum*.

Things in action.

Things in action, and things of that nature, as causes of suit, rights and titles of entry, are not grantable over to strangers but in special cases. And therefore if a man have disseised me of my land, or taken away my goods; I may not grant over this land, or these goods, untill I have seisin of them again. Neither can I grant the suit which the Law doth give to me for my reliefe in the cases to another man. So if I make a feoffment to another man on condition that if I do such a thing, I shall have the land again; in this case I may not before or after the time of performance of the condition grant over the condition to another. But all these things I may releafe to the parties themselves: For it is a maxime in law, that every right, title or interest in *presenti* or in *future*, by the joint act of all them that may claim any such right, title or interest, may be barred or extinguished: And in some cases a grantee of a reversion may take advantage of a condition annexed to an estate for life or years. If a man owe me money on an Obligation, or the like; I cannot grant this debt to another: but I may grant a letter of attorney to another man to sue for it and receive it, or I may grant the writing it self to another, and he may cancell it, or give it to the obligor. A presentation to a Church after the Church is become void, is not grantable; for it is in the nature of a thing in action. And if a man take my goods from me, or from another man in whose hands they are, or I buy goods of another man, and

Co. 5. 24.
10. 48.
Co. super
Lit. 314.
Dier. 241.
Peck. Sed.
86, 87, 89.
Bro. Dant.
17. 24. 48.
Co. 6. 79.

S. e. condition,
Co. super
252.
Peck. Sed.
86.

Dier. 241.

Peck. Sed.
92.
Fitz. Dant.
3. 2.

suffer

suffer them in his possession, and a stranger taketh them from him; it seems in these cases I may give the goods to the trespassor, because the property of them is still in me.

Perk. Sect. 99. Plow. 379. Trusts and confidences which are personal things for the most part, are not grantable over to others. And hence it is also that offices of trust and confidence are not grantable over but in some special cases where they are granted to a man and his Assigns; or where they are granted to a man and his Heirs. And hence it is also

Plow. 293. that a Wardship by reason of a term in socage, which by the law is given to the next of kin, is not grantable over to any other person by the Guardian in Socage.

Fitz Grant 39. 79. Somethings are so entire that they cannot be severed by Grant. And therefore if a man hold three acres of land of me by twelvecence rent, and I grant the services of the third acre; this is void, and he shall have all or none, for I cannot sever the tenure. But if a man hold land of me by homage, fealty, escuage, and a certain rent; in this case I may grant the rent, and keep the Seignory. Entire things.

Perk. Sect. 91. A Villain is grantable for life or years; and if the Villain during the estate of the Grantee purchase land in fee, the grantee shall have it for ever as a Perquisite, albeit he have but an estate for life in the Villain it self. Villains.

Dier 58. Plow. 142. 147. Perk. Sect. 91. Dier 305. Perk. Sect. 90. All Chattels real and personal regularly are grantable from man to man *in infinitum*, as Leases for years, be they present or future, wardships of Tenants *in capite*, or by Knights service, Trees, Oxen, Horses, Plate, Householdstuff, and the like. Also Trees, Grass, and Corn growing and standing upon the ground, fruit upon the trees, wooll upon the sheeps back is grantable. Chattels real and personal.

Co. 5. 24. If a man sell me ten load of wood in his Wood to be taken by his assignment; or sell me three acres of wood towards the north side of the wood; by this grant in these words I have such an interest as is grantable over. If I make a Lease by Deed of a house to another, and therein it is agreed between us, that if the rent be not paid me by such a time, I shall enter into the house and take and sell the goods there as my own to pay the rent; it seems this is a good grant of the goods, and that I may do according to the agreement. And if one that doth hold land of me, grant to me by Deed indented, that I shall distrain for my service in all his land; this is a good grant. Distress.

Fitz. Grant 6. Fitz Done 11. A man may give or grant money, as if I deliver one money on condition that if he assure me of such land he shall have it, otherwise that he shall deliver it to me again, in this case if he make the assurance he shall have the money, if not, I may have an account for it. Money.

Bro. Done 34. Such things as are *fera natura*, as Coneys, Hares, Deer, and such like, are not grantable at all. *Fera natura*.

Perk. Sect. 90. A Parson of a Church may grant his Tithes for years, and yet they are not in him. Tithes.

A man may give or grant his Deeds, *i. e.* the parchment, paper and wax to another at his pleasure, and the grantee may keep or cancel them. And therefore if a man have an obligation, he may give or grant it away, and so sever the debt and it. So Tenant in fee simple may give or grant away the Deeds of his land, and the Executor in the first case, and the Heir in the last case, hath no remedy. But a Tenant in tail of land cannot give or grant any of the Deeds belonging to the land intailed, no more then the land it self. One may give or grant Apparel; and it is said if one make Apparel for another, and put it upon him to use and wear, this is a gift or grant of the Apparel it self. If one grant to another all the wooll of his sheep for seven years, this is a good Grant.

Apparel.

VVooll.

If one being a Parson give to another all the wooll he shall have for Tithe the next year, this is a good Grant.

Uncertainty.

If one grant to another his Horse or his Cow in the disjunctive, this is a good Grant, notwithstanding this uncertainty, and the Donee shall have election, and by that make the Grant good.

2. In respect of the estate, property and possession of the Grantor.

Any estate that a man hath in fee simple, fee tail, for life, or years in any lands, *&c.* or any rent, or profit appender out of the same is grantable from man to man *in infinitum*. And he that hath any such estate of any lands, may charge it with any rent or profit to be taken out of it as long as the estate of the land doth last. But an estate at will is not grantable over. And if an estate be made to a man and his Heirs, without the word Assigns, yet he may assign it at his pleasure, for Assigns is included within Heirs.

An *Interest termini*, *i. e.* a Lease for years to commence in *ferro*, is grantable before the term doth begin, whether it be a Lease of the land it self, or any rent or other profit out of it.

The interest or estate that a man hath by extent is assignable from man to man at pleasure.

The reversion upon an estate tail is grantable And yet the Tenant in tail in possession by the suffering of a common recovery, may bar him in reversion of any fruit of it.

If an estate be made of land upon condition, as if *A* make a Feoffment to *B* on condition that if *A* pay 20 *l.* he shall have the land again: in this case *A* and *B* together may at any time before the performance of the condition joyn together and grant this land, or charge it with any rent, *&c.* and this will be good, for it is a maxime in law, Fee simple land may be charged one way or other. And in this case *B* may grant over his estate alone, but it will be subject to the condition. And if *B* grant a rent out of the land to a stranger, and after the condition is performed, and the Feoffor enter, in this case he shall avoid the rent. But in this case *A* cannot grant, for he hath nothing but a possibility. If one enfeoff divers to the use of his Son and Heir upon condition, and before the time of performance

Co. super
Lit. 213.
Trin. 18
El. B.R.
2, H. 8, 5.
1 H. 7.
Doves
cale.
1 H. 4, 31.
Fitz. Bar
179.

Perk. 36.
90.

Fitz Grant
40.

Bro. Done.
19.

21 E. 4, 39.
14 c. k. 104.
91.

Co. 4 64.

Co. 6. S.
Geo. Cor-
sons c. 1.
Co. 1: Al-
r. 10 woods
cale.
Co. 1. 147.
10. 43, 45.
Lit chap.
Confi mar-
tion.

Co. 1. 148.

manance of the condition, the Father and Son joyn to grant or charge the land, this is a good grant or charge.

Co. Super
Lit. 45.
Co. 1. 48.
49.

If the Tenant in tail, and he that is next in remainder in fee joyn in the grant of a rent charge in fee, and after the Tenant in tail doth die without issue; in this case this is a good grant and charge against him in remainder. And if *A* do bargain and sell land to *B* by Indenture and before inrolment, they do joyn to grant a rent charge to *C* by Deed; in this case this is a good charge and grant, whether there be any inrolment or not. And so if Donor and Donee in tail grant a rent charge out of the land, and then the Donee die without issue; in this case the grant is good to binde the Donor.

Co. Super
Lit. 182.

If land be granted to two men, and to the Heirs of their two bodies begotten; in this case albeit they have several inheritances after their death, yet neither of them can grant away his estate after his life, for they are divided onely in supposition of law.

Perk. Sect.

One Coparcenor of a Seigniory may grant his part to a stranger:

Perk. Sect.
93.
103.

If two joyntenants be of a plow-land, and one of them doth grant to a stranger common of pasture for beasts without number to be taken in the same land, this is void.

Perk. Sect.

If two joyntenants be of a reversion, and one of them grant the whole, this is void for a moiety. If a man grant or charge that which is none of his, and that wherein he hath no propriety, it being in the Grantee or a stranger; the grant is void. And therefore if a man grant a rent charge out of the Manor of Dale, or grant a reversion of land, and in truth the Grantor hath nothing in the Manor of Dale or in the land; in this case the grant is void. And albeit the Grantor do afterward purchase the Manor, or the land, yet this will not make the grant good. But if the grant be by fine, or by indenture, there in some cases it shall be good by way of Estoppel. And in this case albeit the party recite that it is his own, yet this will not mend the cases. And therefore if a man recite that he hath a rent of ten pound a year, and then grant five pound a year, parcel of it; in this case if he hath no such rent the grant is void.

Jointenants.

80.

Perk. Sect.

69.

Dier 1033

Estoppel.

80. Donee

50.4.

A Shepherd, Bailiff, or Parker, cannot give or grant away the goods of his Master without authority. And yet it seems the servant of a Taverner or Mercer, may give or grant his Masters Wine or Wares. And if a Wife give or grant the goods of her Husband; this is a good grant or gift until the Husband disagree to it, and by his agreement it is made good for ever.

Servant.

Husband and

Wife.

Plow. 524.

525.

If a man have a Lease for years of land, and make a Lease for life of it, or charge it for longer time then the Lease for years doth last; in this the grant is good for so long as the Lease for years doth last and no longer. But if he make a Lease for life and give livery of seisin he doth forfeit his estate.

Co. Super

Lit. 214.

Perk. Sect.

69. 86.

Regularly a man cannot grant, or charge that which is not in

Estoppel.

his own possession, albeit he hath a right to it: And therefore if a man be disseised of his land: and before he hath entred into, or recovered the land, he doth grant or give the land, or his right to the land to a stranger, or grant a rent charge out of the land to a stranger; in these cases the grants are not good. And yet such grants by fine may be good by way of estoppel. And by a release also the right may be extinct. But if one hath a reversion upon an estate for life, and he grant a rent issuing out of this land; in this case the grant is good, and the charge shall fasten upon the land after the estate of the tenant for life is ended. And if a man grant common, or rent, notwithstanding that a stranger take the rent, or use the common at the time of the grant, yet this grant is good, for a man cannot be out of possession of these things but at his pleasure. † And if a Lease for years be made to me, I may grant away my estate before my entry. And if the lease be to begin at a day to come; I may assign over my interest before the day come, for in this case the interest is in me from the time of making the lease. * Also I may give or sell my goods that I have not in possession, and therefore if a man take my goods out of mine or another mans possession; I may afterwards give or grant these goods to him or another man, and this grant or gift is good.

Perk. 3ed.
93, 98.
Co. super
Lit. 46.

† Hil. 18.
Jac. B. R.
per 2 Ju-
stices.

* Perk. 3ed.
92, 93.
Fitz. Donee
3. B. O.
Donee 13.
Dier 90. 39
Co. 4. 63.
63.

Dier 305.
20 H. 6. 22.
Perk. 3ed.
59.
Co. 11. 50.

Tenant for life.

Trees.

A Lessor cannot give or grant the trees growing on the ground of his Lessee for life, or years without the licence of the Lessee, except they be first cut down by the Lessee or some other, for then he may. And if there be lessee for life, and the lessor give the trees growing on the ground, and after the lessee for life dieth; in this case the Donee cannot take them, for that at the time of the gift a property of them was in the lessee. But if a Tenant in fee simple give or grant the houses standing, or trees growing on the ground he hath in possession, in this case the grantee or donee may take them after the death of the grantor, and that albeit they be not cut or taken down before his death. And yet if the Tenant in tail give or grant the trees growing upon his intailed land, and the Donor die before the trees be cut, in this case the donee or grantee cannot cut them afterwards. Howbeit if such a tenant in tail give or grant his emblements of corn growing on the ground; the donee may cut and take them after the death of the tenant in tail. And if the tenant in tail give or grant his trees and die before they be cut, and afterwards before the issue in tail enter into the land, the donee or grantee cut them and take them away, in this case the issue in tail can bring no action of trespass against the donee or grantee for the trees. But perhaps if the trees be not removed off the ground he may take them.

Tenant in tail.

Emblements.

Presentation.

If two Coparceners be of an Advowson, and the one doth present, and then he doth grant the next presentation; this is a good grant, but by this grant doth pass the next he hath to grant, for his companion must have the next. So if one be seised in fee of an Advowson.

Dier 35.
14 H. 7.

advowson, and he hath a Wife, and he grant the third presentation; this is a good Grant, but it shall be taken for the third he may grant which is the fourth, for the Wife is to have the third for her dower.

Perk. Sect.
Dier 15.
250. Lit.
Bro. Sect.
298.
Perk. Sect.
102.

If a man have granted a thing once, he cannot afterwards grant it again. And therefore if a man give or grant me a horse, first by word of mouth, and after grant him to me by Deed; this second Grant is void, and therefore if there be any fault in this Grant in writing, it is not material. And if a man grant to me common of pasture without number in his ground, and after make the like Grant to another, this second Grant is void as to me, albeit it be good against the Grantor. And if one grant the next presentation to a Church, after the death of the present Incumbent, and after grant the same to another; or make a Lease of land to one for ten years, and after make a Lease of the same land to another for the same ten years; or give a horse to one, or after give the same horse to another; in all these cases the second Grant is void. But if the first Grant or Gift be onely of part of the thing granted afterwards, or of part of the time onely, the second Grant will be good for the overplus. And therefore if one be seised of a Manor, and demise ten acres of the demesne for ten years, and after demise the whole Manor to another for twenty years; this is a good Grant for the overplus of the Manor besides the ten acres presently, and for the whole Manor for the last ten years. So if the second Grant be to begin after the first is determined, it is good. And if the second be such as may be satisfied and not impeach the former, both shall stand good. And therefore if one that hath an Advowson grant the next presentation to one, and after he doth grant the next presentation to another, and doth not say [after the death of the Incumbent;] in this case the second Grant is good, and the Grantee thereby shall have the second avoidance after the death of the present Incumbent.

3. In respect of a former grant of the same thing.

Co. 4. 112.
Perk. Sect.
214, 106
Co. 10, 106
107, 11. 47
a) Pl. 190.
b) Co. sup.
Lit. 46.
See also
Co. 2. in
Laner case
which
doth seem
to warrant
this opini-
on also.
Dier, the
grant is
good in a
common
persons
case. Bro.
Grant.

By the grant of an acre of land, or of any other thing by the name whereby it is called, the reversion of that thing, if the Grantor have no more then a reversion, will pass, and this mistake will not hurt. But it is not so *et converso*. And yet some have said, if one grant a thing in possession by the name of the reversion of the thing, this is good to pass the possession. *Quod non est lex.* For if one make a Lease for years, and before the Lessee enter, the Lessor grant the land by the name of the reversion or the land; this Grant is void. If one make a Lease for life of the demesne of a Manor rendring rent, and after he doth grant the Manor by the name of the Manor, this is a good Grant for the reversion of the demesne as well as for the residue of the Manor. But if one grant common by the name of the reversion of the common, it seems this is not good. And yet if one have common and grant it for life, and during that

4. In respect of naming or description of the thing granted. Misnaming or Misrecital.

estate he doth grant the common by the name of *Totum illam Communiam suam*; &c. some do hold this grant to be good.

Any thing may be granted by the name whereby it is and hath been usually called of later times within nine or ten years or thereabouts, albeit it be an improper name, and not the antient name of the thing, but a name newly gotten. And so a Manor may pass by the name of a Messuage or Farm, or a Farm or Manor by the name of a Messuage if it be so usually called and reputed. So the great houses in London called *Excester* and *Dorset* houses may be granted by those names. And if a man grant that which indeed is a pasture ground by the name of a wood; or grant that which indeed is a wood by the name of a pasture ground, and the things are called by those names, these are good grants of those things. And if one grant by the name of a great field, that which indeed is but a little close, but it is usually called by the name of a great field; this is a good grant of this thing. So if one grant by the name of a Plow-land, that which in truth is but an acre of land, or grant by the name of a Manor that which is but a Plow-land; these grants are good. And so as it seems it is *à contrario*. But if a man grant a house or a Messuage; by this grant an acre of land will not pass.

By the grant of services, a rent reserved upon an estate tail will pass.

If a man make a Lease of a house to another for years, and the Lessee divide it and make two houses of it, and after the Lessor doth grant the reversion of it by the name of one house; this is a good grant to pass it. And if one lease three houses to three several men at several times, and they divide them into twenty nine tenements and households in them all; and the first Lessor doth grant them by the name of three Messuages: this is a good grant to pass them all. But if he grant by the name of fifteen Messuages or Tenements only, it seems this is good for no more but for fifteen of the subdivided Tenements.

If one recite that he hath a rent charge issuing out of black acre and white acre, and then grant the same rent, and in truth it doth issue out of black acre onely: or if he do recite that it doth issue out of one acre when in truth it doth issue out of both; in both these cases the grant is good notwithstanding these mistakes.

If one be Patron of the Church of *S. Peter and Paul* in *D.* and he grant the next Presentation of the Church of *S. Peter*, or of the Church of *St. Paul*; these are void grants to pass the Presentation.

* If one grant a rent out of white acre, by the name of a rent out of black acre; this grant is void, as to charge white acre.

If one have a Manor called *grapple Lovington*, and he grant it by the name of *West Lovington*; alias *Steeple Lovington*, by the [alias] especially

Co. 6. 66.
45 E. 3. 4.
Bro. grants
7.
Perk. 362.
116.

14 H. 8. a.
27 H. 9. a.

Co. super
Lit. 150.
Mile. 2.
Jac. Curia.
B. R.

Perk. 362.
72.

Bro. grants
12.
Perk. 362.
79.
Per. Ch.
Just. Hutton
and Yelverton
Co. B. Mile.
3 Car. in
the case of
Edward
Crem.

especially if the Grant say Flying in *Exhibition* T and the Minor of *Simple Living* doth lie in that parish, and the Grantor hath no other land there.

Mic. 2 Jac.
in Brown
case a-
gred, 1861
1862-1863

If one grant all his lands which he hath in D. in this manner, [All my lands in D. which I had of the grant of I. S. ;] this is a good Grant of all his lands in D. albeit he had them not of the grant of I. S. but of the Grant of another. But if the words be [all my lands which I had by the grant of I. S. in D. ;] in this case the grant is not good to carry any other lands in D. but such as he had of the grant of I. S. So if one grant in this manner [all my Manor of Sale in Dale which I had by descent] and in truth he had it not by descent but by purchase, this is a good Grant of the Manor. So if one grant all his lands in Dale and say no more, this is a good grant to pass all his lands there. But if one grant in this manner [All my lands in Dale which I had by descent from my Father] and in truth I had them not by descent but by purchase, this grant is void, and will not pass those lands. So if I grant in this manner [all my lands that I had by the attainder of I. S.] and in truth I had no land by that means, this grant is void. And if I grant after this manner [all my lands in B. in the tenure of D. which I had of the gift of I. S.] and in truth it doth lie in Band in the tenure of D. but it was not purchased of I. S. ; this is a good Grant to pass the land.

Plow. 169,
395: And
so was the
opinion of
Ch. Justice
Popeham.
a Jac. B. R.

Dier 87.

M. c. a Jac
Adjudge
Browns
case.

Dier 297
Co. 3. 10

If a parish lie in two Counties, viz. *Berke* and *Wills*, and one grant in this manner [all his close called *Callis* in the Parish of *Hurst* in the County of *Berke*] and in truth the close doth lie in the County of *Wills*, this is a good Grant to pass the close. But if one grant in this manner [All his houses in the Parish of *S. Busselphi extra Al-gar*, late in the tenure of R.] where in truth he hath no houses there, but he hath some houses in *S. Busselphi extra Aldersgate*, this is a void Grant. And yet If the Grant be in this manner [All that my house in the occupation of I. S. in *S. Andrews* parish] whereas in truth it is in the Parish of *K.* but in the occupation of *I. S.* it seems this grant is good to pass the house. But if it be thus [All that my house in *S. Andrews* Parish in *Holborn* in the occupation of *I. S.*] and in truth it is in another Parish, but in his occupation, this Grant is not good to pass the house.

Hil. a. Jac.
B. R. per
Tanfield.

If one grant in this manner [my Manor of Dale which appeareth by Office found to be of the value of ten pound ~~per annum~~] and in truth in the Office it is found at twenty pound ~~per annum~~ this grant is good notwithstanding this misprision.

Dist. 7.
Jac. B.R.
Co. 2. 226

If one grant in this manner [All my Manor of W. late parcel of the possession of the Abbot of S. and late in the possession of K.] and in truth it was never in the possession of K. this Grant is good notwithstanding. But if the Grant be thus *Omnia illa terrae, &c.*

in *tenura* I. S. *iacen. in W. super prioratu de S. Spellan.*] and in truth the land doth lie in S and not in W, this is no good Grant to pass the lands in S. And if the lands do lie in W, but are in the tenure of I D, and not in the tenure of I S, the Grant is void to pass the lands in the occupation of I S.

If one purchase land of I S in T, and have no other land there, and he grant his land in T, late the land of R S, or late the land of S, and mistake or omit the Christian name, this Grant is good notwithstanding this mistake. And so also it is where there is a blank left for the Christian name. And if in this case he grant all his land in T, and say no more, this is a good Grant to pass the land. And if one grant [all his lands in D called N, which were the lands of Y S,] this is a good Grant to pass the lands called N, though they were never the lands of I S. But if the Grant be [of all his lands in D, which were the lands of I S] by this none but those lands that were the lands of I S will pass.

Dier 176.
Bro. Grant
23.

If one grant in this manner [all my Meadow in D containing ten acres] whereas in truth his Meadow there doth contain twenty acres, it seems this is a good Grant for the whole twenty acres. So if one grant thus [All those forty seven acres of land by the Slight, whereof fifteen lie in D, twenty in E, and twenty five in F] and in truth all of them do lie in F, and none of them in D or E, this is a good Grant to carry the whole forty seven acres.

Dier 80.

If one grant twenty load of wood, and say in his Grant [of which twenty load of wood he had sixteen load by the Grant of his Father I S] and in truth I S did not grant any wood to him at all, or did not grant unto him sixteen load only: this is a good Grant of the twenty load of wood notwithstanding this false recital.

Bro. Grant
69.

If one grant his Manor of D, and doth not say in what Town or Towns it doth lie, this is a good Grant. But it is best to say in what Towns the Manor doth lie, for if it lie in divers places (as it may) and any of the places into which it goeth be omitted, and the rest are set down, no part of the Manor lying in the Town that is not expressed will pass.

Bro. grant
53. 7H. 4.
41.

If one grant a Manor, and that which in truth is but one Manor, by the name of the Manor of A and B: this is a good Grant of the Manor. And so also it is if it be two Manors, as if a man be seised of the Manors of Ryson and Conder in the County of Salop, and he grant in this manner [*totum illud Manerium de Ryson & Conder cum pertinent. in Com. Salopia.*] this is a good Grant of both the Manors. Otherwise it is in case of the King.

Co. 1. 46.

Progreive.

If one have a Farme of land, meadow, &c. by Lease called *Hodges*, lying within the parishes of S. Stephen and St. Peter in S. Albons, and he reciting the said Lease grant to C his term and interest in the house, lands, &c. called *Hodges* in the Parish of St. Peter

Curia Col.
B. Paf. 9.
Jac. Inten.
Plat. &
Sleep.
Bro. Grants
12. 13.

in S. *Albani*; this Grant is good onely for so much as doth lie in the Parish of S. *Peter*, and not for that which doth lie in S. *Stephens*. But if he grant the Farm, and doth not say in what Parish it doth lie; this is a good Grant of the whole Farm. As in the case before of a Manor that doth lie in divers Parishes. And if in the case here the Farm lie within the Parish of S. *Peter* onely; the grant is good for the whole Farm. If one recite that whereas he hath such lands by forfeiture, or whereas such a one hath an estate of his land, or whereas the Grantee hath paid him 10 L. or done him such service, or the like, and these things are not true, and afterwards he doth grant the land by apt words; this mistake in these cases will not hurt the Grant. But otherwise it is in case of the King, in some of these cases.

Prerogative.

If one have a Manor in which he hath Parks and Fish-ponds, and he grant the Manor for life, except the Game and Fish, and after grant the reversion of the Manor; this is a good Grant of the Game and Fish also.

If a Grant be of [*centum libratas terra*, or *50 libratas terra*, or of *centum solidat. terra*] it seems these are good Grants, and that hereby doth pass land of that value, and so of more or less.

If a Grant be of an acre of land covered with water, this is a good Grant.

If a Grant be of a certain portion of land or tithes, or of the fourth part of land or tithes, and there be a sufficient certainty in the description of it, this Grant is good. And therefore if the Grant be of the fourth part of the tithes and of the offerings of the Church of S. *Peter*, this is a good Grant.

If one seised of an Advowson in Fee grant to *I S*, that as oft as the Church is void he shall name the Clark to the Grantor, and he shall present him to the Ordinary; this is a good Grant of the Advowson.

A reversion may be granted by name of a remainder, or a remainder by the name of a reversion, and such a Grant is good; As if one grant land to *I S* the reversion to *I D*; this is a good grant of the remainder.

If one make a Lease of Land to Husband and Wife for their lives, and after grant the reversion of this by the name of the reversion of the land which the Wife doth hold for life: this Grant is void. So if one grant to two for life, and after grant the reversion of one of them, this is void.

A Fulling or Grist Mill may be granted by the name of a Mill only.

If one grant in this manner [All that is messuage, &c. and all Incertainties the lands, meadows, and pastures thereunto belonging:] this is a good Grant, and certain enough to pass all the lands, meadows and pastures usually occupied therewith.

If.

If the Lord grant his Manor by the name of [his Manor with the reversion of all his Tenants:] or by the name of [the reversion of all his Tenants bond and free which hold for life or years] and do not name them by their particular names, these Grants are good in these cases and certain enough.

First Grant
68.
Perk. Sect.
68.

If one grant land, and say not in what Parish, or County, or village it doth lie; yet if there be any other matter to describe it, it seems the Grant is good enough, and it may be averred where it lieth. But if there be no circumstantial matter in the Grant to denote and decipher out where it doth lie, it seems the Grant is void for uncertainty. And therefore if one Grant his Manor of Dale, or his lands in the occupation of I S, or his lands that descended to I S, or his lands that did belong to the Priory of S, or the like, these are good Grants, and certain enough. *Id. certum est: quod cuiusm reddi potest.*

Bro. Grant
13.
Co. 9. 47.

If there be Tenant for life of three houses and four acres of land, and he in reversion grant the reversion of two houses and of two acres of this land; this is a good Grant, and hath sufficient certainty in it.

Perk. Sect.
79.

If a Grant be uncertain altogether, and have not sufficient certainty in it, and cannot be made certain by some matter *ex post facto*, it is void. And therefore if there be Lord and Tenant of three acres of land by Fealty, and twelve pence rent, and the Lord grant [the services of the third acre] to a stranger, this Grant is merely void. So if Husband and Wife hold an acre of land joyntly of I S for their lives, and I S grant the reversion of the acre of land which the Husband alone doth hold for his life; this Grant is void. So if there be Lord and three Joyntenants, and the Lord grant the services of one of them to a stranger, this grant is void. So if one have twenty Tenants that do pay him twelve pence a piece rent, and he grant five shillings yearly out of these rents, and doth not say of which Tenants, this Grant is void for uncertainty. So if consuance of pleas be granted, and it is not said before whom, this is utterly void. So if one have two Tenants, and doth grant the reversion of one of them, and doth not say which, this is void for uncertainty. So if one grant Estovers to another, and say not what nor how, this is void. So if one grant me so many of his trees, or of his horses, as may be reasonably spared, this Grant is void. And yet if one grant me so many of his trees as I S shall think fit, it seems this Grant is good. And if one grant me one hundred load of wood to be taken by the assignment of the Grantor, or to be taken by the assignment of I S; these are good Grants. So if one grant me three acres of wood toward the North side of the wood, this is a good Grant, and certain enough.

Perk. Sect.
67.

Perk. Sect.
68, 69.

9 H. 6. 14.

4 E. 2. 177
Bro. Grant
52.

Dier 91.

Co. 5. 24.

Bro. Done
31.

If one grant to one of the children of I S, and I S hath more then

then one, and he doth not describe which he doth intend; this grant is void for uncertainty.

If one grant to me a rent or a robe, twenty shillings or forty shillings, or common of pasture or rent, in the disjunctive which is at first very uncertain; yet this grant may become good, for if I make my election, or be paid the rent, or perform the grant in either part; the grant is now become good. So if one be seised of two acres of land, and he doth lease them for life, the remainder of one of them, and doth not say of which to T. S. in this case if T. S. make his election which acre he will have, the grant of the remainder to him will be good. So it is when a man hath six horses in his Stable, and he doth grant me one of his horses, but doth not say which of them; in this case I may chuse which I will have; and in these cases when I have made my election, and not before, the grant is good. And if in these cases the Grantee do not make his election during his life; it seems the grant will never be good. If one be seised of land, and lease it for years, rendring ten shillings rent, and after he doth grant a rent of ten shillings out of this land to a stranger; in this case albeit there be some uncertainty in the grant, yet this is a good grant of a rent of ten shillings, but it shall be taken a grant of a new, and not of the old rent, and therefore shall not take effect, until the particular estate be ended.

See more to this point in *Deeds*, and their *Expositions*, cap. 5. *Numb. 15.* and *Fine cap. 2. Num. 7.*

In some cases, albeit there be in a Grant, a good Grantor, and a good Grantee, and a thing granted, and all these are duly and certainly described; yet the grant may be void, for some fault in some other thing touching the grant: as, 1. In the commencement of the estate. For if a man be possessed of a term of years, albeit it be one hundred years or upwards, and grant to another all the residue of this term of years that shall be to come at the time of his death; this grant is void for uncertainty. And yet if a man possessed of such a term in land, grant the land to another, to have and to hold to him after the death of the Grantor for fifty years or for two hundred years; these are good grants, and in the first case the Grantee shall have fifty years; if there be so many to come of the term of one hundred years at the death of the Grantor, and in the last case the Grantee shall have the land for the whole one hundred years, or so many of them as are to come at the death of the grantor. So if one grant any thing that doth lie in livery or in grant, and that is in *esse* at the time of the grant in Fee simple, Fee tail, or for life, and the estate is to begin at a day to come; this for the most is void: Howbeit in some cases the livery of seisin will help it. But a Lease for years to begin in *future* is good enough. And if a Lease be made to one for years, or for years determinable upon lives, and

5. In respect of matter in some other parts of the Grant.

1. In the commencement of the estate.

Uncertainty.

9 E. 4. 36.
Perk. Sect.
74.

Perk. Sect.
76.

Bro. Grant
27.

Bro. Grant
154.
Co. 1. 155.
Plow. 320.

Dier 58.
Co. 5. 1.

Pals. 7.
Jac.
Diennis
case.

and after a Lease is made to another of the same thing. To have and to hold from the end of the former Lease, this is a good Lease, and the commencement certain enough. So if a Lease be made of land to one for life, and after the reversion thereof is granted to another for life, *cum post mortem vel alio modo vacare contigerit*; this is good. So if a Lease be made to one for twenty years if he live so long, and after a Lease is made to another *Habendum* after the end of the term granted to the Lessee, for twenty years to be accounted from the date of the Deed last made, this is a good grant for twenty years after the first Lease ended, and the words [to be accounted, &c.] shall be rejected. And if one grant a rent to me, *Habendum* from

Cradoche
case.
Pasc. 7 Jac.
Co. 8.

Co. 9.

Plow. 193.
Co. 6. 36.

28 H. 4. 16.
Plow. 21.

Perk. 268.
75. 77.
Plow. 151.

Co. 10. 107.
Plow. 147.

2. In the limitation of the estate. Or in the *Habendum* of the Grant.

Incertainity.

3. In respect of the end or ground of the Grant.

7. In respect of omission of some ceremony, &c.

the time of my full age for my life, and I am at full age at the time of the grant, this grant is good for my life. If a woman sole have a Lease for years and take a Husband, and then he in reversion grant the land to another *Habendum* after the term granted to the Husband, &c, where in truth it was never granted to the Husband but by an act of law, viz. the marriage, yet this is a good Lease. 2. In the limitation of the estate. For if a grant be to two, *& herediis*, without *Snis*, this is void for incertainity. And yet a Grant to one *& herediis*, is good. And if a man grant two acres to have and to hold, the one in Fee simple, the other in Fee tail, or the one in Fee simple, and the other for life, and doth not set down which in Fee simple, &c. in certain, yet this Grant is good, and the Grantee hath the election. And yet if one grant two acres to two men *Habendum* the one to the one, and the other to the other, and say not which either of them shall have, this is void for incertainity. And if one have a reversion of land after a Lease for years, and grant the land, *Habendum* the reversion, or grant the reversion, *Habendum* the land, this is good.

In some cases a Grant or Gift may be void, at least to some persons and purposes, when there are none of the defects aforesaid in it, as when it is made upon a corrupt contract, or to the end to defraud Creditors of their debts, or purchasers of their lands bought, or the like, whereof see before in *Deed, cap. 4. Numb. 5.*

And in some cases, albeit there be no other fault in the Grant, yet it may become void for want of some other matter that ought to be done, as inrolment, livery of seisin, attornment, &c. for where these things are requisite, the Grant is not good until it be had, neither for that thing which will not pass without that ceremony, nor yet for that which otherwise would pass by the Deed. And therefore if a Feoffment be made of a Manor to which an advowson is appendant, and no livery is made, so that the Manor doth not pass, the advowson will not pass neither. Where a Grant may be void by the refusal or waiver of the Grantee, see before in *Deed, Num. 6.*

28 H. 7. 5.
Co. super
Lit.

7 H. 6. 14.
an H. 7. 13.
Perk. Sect.
69. Bro.
Grant 175
Kew 48.

If one make a Feoffment with warranty, and after the Feoffee doth grant to the Feoffor, that neither he nor his Heirs shall vouch the Warrantor, or his Heirs upon the warranty; this is a good discharge of the benefit of Voucher and doth bar the Feoffee of it. And yet he may bring a *warrantia Carta* still. So if one grant to me a rent-charge and afterward I grant to him that he shall not be sued for this rent; this is a good grant to bar me of bringing an annuity for the rent. And yet I may distrain for the rent still. And so, *converso* if I grant to the Grantor, he shall not be distrained for the rent, by this I am barred of a distress, but not of bringing an annuity for the rent. So if the Lord doth grant to his Tenant holding by Knights service, that his Heirs shall not be in ward, &c. or a man doth grant to his Debtor that he will not sue him for the debt at all, or until such a time; or one grant to his Lessee for life or years that he shall not be impeached for waste, all these are good discharges, and may be pleaded by way of bar to avoid circuity of action.

4. What shall be said a good grant in the nature of a release or discharge. Or not.

And now because Attornment, as hath been shewed is necessary in some cases to the perfection of some Conveyances, and Grants of things lie in Grant, and not in Livery, we must therefore here ere we can go further, as a necessary appendix to Grant, add the learning of Attornment which followeth next in order.

CHAP. XIII.

An Attornment:

Co. Super
Lit. 109.
Terms of
the Law.
Flow. 25.
Mar. Sect.
351.

AN Attornment is the agreement of the Tenant to the grant of the Seignory, or of a rent, or the agreement of the Donee in tail, or Tenant for life or years, to a grant of a reversion or of a remainder made to another. As where the Lord, or one that hath a rent out of land, doth grant over his Seignory, or his rent to another, or one that hath a reversion or a remainder after an estate for life or years doth sell or give the same away to another: in these cases the Tenant of the land must have notice of this sale or gift, and of the alteration of the party to whom he must attend in his services, and he must give his consent to the same gift or grant, or else generally the same is not good. And this yielding of consent is called an Attornment. And it is either actual or verbal, or actual and verbal both.

1. *Quid*

That which is actual, is either implied, and in law; or expressed and in Fact. Of all which there are divers examples hereafter following.

2. *Quomodo*

The

3. The effect of it.

The end, effect, or fruit of this agreement is to perfect a grant and to make a good conveyance of an estate; for where this is needful no rent nor reversion will pass without it, neither can the Grantee of the Seignory, rent or reversion bring any action of waste, for waste done in the land, nor distrain for any rent or service upon the land before this is done. But this is but a bare assent, and therefore it shall not nor will enure or work to pass any interest, to make a bad grant good, to enfranchise a Villain, nor to give a man a tenancy by disseisin, intrusion or abatement, neither shall it work by way of estoppel. And therefore if a man gain a rent issuing out of land by coercion of distress or otherwise, and the Tenant of the land attorn to him, this will not amend his estate. But otherwise a grant and the Attornment of the Tenant do as effectually pass the freehold and inheritance of the reversion of land, as a Feoffment and livery of seisin of land doth pass the possession of land.

4. Where and in what cases the Attornment of the Tenant is necessary. Or not. And how. And to what intents.

In most cases where the Grantee hath means to compel the Tenant to attorn, there the Attornment of the Tenant is at least to some purposes needful, for howsoever it be true, that if a Seignory, rent, services, reversion, or remainder be granted by fine, in this case the rent, seignory, &c. doth pass, so as the Grantee may enter for a forfeiture upon the alienation of the Tenant, being Tenant for life, years, by statute or elegit, or upon an escheat of the Tenant, or seile a Ward or Heriot if it happen before any Attornment be made: And if the reversion of a Lease for years be granted by fine, and the Lessee be ousted and the Lessor disseised, the Conusee may have an Assise: and therefore as to all these purposes the Attornment of the Tenant is not needful. But the Grantee, his Heir or Assignee, cannot distrain the Tenant for rent, or bring any action that doth lie in privity between him and the Tenant, as waste upon a waste done by the Tenant, Writ of entry *ad communem legem*, or *in casu proviso*, or *in consimili casu* upon the alienation of the Tenant escheat upon the dying of the Tenant without Heirs, or Ward upon the death of the Tenant his Heir within age, or Writ of customs and services, until he have the Attornment of the Tenant: and therefore as to all these purposes the Attornment of the Tenant is necessary. And hence it is that the Conusee of a fine hath means appointed him by the law to compel the Tenant to attorn; for in case where the Lord doth grant the Seignory to another, and the Tenant will not attorn, the Conusee before the Fine be ingrossed, may have a Writ called a *Per quia servitia*, and thereby compel him to attorn. And in case where a man doth grant a rent to another, and the Tenant of the land out of which the rent doth issue will not attorn, the Conusee of the rent may have a Writ, called a *Quem redditum reddit*, and thereby compel him to attorn. And in case where a man doth grant a reversion or a remainder of his Tenant for life to another and

Per que servitia.

Quem redditum reddit.

Lit. Sect.
351.
Co. super
Lit. 302.
Lit. Bro.
Sec. 267.
189. 319.
39 H. 6 24.
Co. super
Lit. 323.
313.
Lit. Sect.
608.

Lit. Sect.
379. 380.
302.
Co. 668.
Co. super
Lit. 309.
314. 310.

Old N. B. A.
Co. super
Lit. 252.
Idem.

Idem.
Co. super
Lit. 310.
*Co. super
Lit. 311.

Co. 2. 68.
Lit. Sect.
334-389.

and the Tenant will not attorn, the Conusee of the reversion or remainder may have a Writ called a *Quid Juris clamat*, and thereby compel the Tenant for life to attorn. * And if the Conusee of the fine die, in these cases before he have the Attornment of the Tenant, his Heir albeit he come to the thing descended by act of law, yet shall be in no better case then his Ancestor was. And if the Conusee of a fine by which he hath a reversion granted to him before he hath gotten the Attornment of the Tenant, bargain and sell the reversion by Deed indented and inrolled; the Bargainee shall be in no better case then the Bargainor was. And if a reversion be granted by fine, and the Conusee before Attornment enter and make a Feoffment, and the Lessee re-enter; in this case the Feoffee cannot distrain for the rent. And yet if there be Lord, Mesn and Tenant, and the Mesn grant the services to his Tenant by fine to another in fee, and after the Grantee die without Heir, and by this means the services of the Mesn escheat; in this case the Lord may distrain for them without any Attornment of the Tenant.

Quid Juris clamat.

Co. 2. 66
Lit. Sect.
351. 367.

Co. super
Lit. 316.
*Lit. Sect.
351.

Co. super
Lit. 315.
Perk. Sect.
636.

Co. 2. 68
Dier. 8.
Sed. 35.
Lit. Sect.
353.

Co. super
Lit. 311.
Sect. 372.

Co. super
Lit. 315.

Co. 2. 35.
Lit. Bro.
Sect. 298.
Dier. 307.

Co. super
Lit. 312.
Lit. Bro.
Sect. 151.

379. a. o.
Attorn. 59
Dier. 26.
Lit. Bro.
346.

In these following cases Attornment in Law or in Deed is absolutely and to all intents necessary, *viz.* * Where one doth make a Lease for life or years to one, and after doth grant the reversion or remainder after the same Lease ended to another by Deed in fee simple, fee tail, for life or years; in this case the Lessee for life or years must attorn. ^b So where the Lord doth grant his Seignior or the services of his Tenant by Deed in fee simple, or otherwise in fee tail, for life or years to a stranger; in this case the Tenant must attorn. ^c So where the Lord of a Manor doth make a Feoffment of his Manor, in this case the services of the Tenants will not pass without their Attornment. ^d So if another man have a rent service, sent charge or rent seck, issuing out of my land, and he doth grant this rent to a stranger, in this case I must attorn to this grant to the stranger. And if in these cases the Tenant do not attorn, the grant of the reversion &c. is meerly void.

If a reversion be granted after an estate of a Tenant by Statute Merchant, Staple, or Elegit, or after an estate that any one hath until debts be paid, or the like; in these cases these Tenants must attorn, or this grant will not be good.

If one make a Lease for years of land rendring rent, and after he doth grant the reversion to another for years, to begin after the death of the Grantor; in this case it is needful that the Lessee for years in possession do attorn to make this grant good. But if one make a Lease of his land to one for ten years, and after make a Lease of it to another, To have and to hold from the end of the said term of ten years for the term of twenty years, in this case it seems it is not needful that the first Lessee do attorn, but that the grant is good enough without it. If one make a Lease to another

for

for twenty years, and he make a Lease over to a third for ten years, rendering a rent, and then doth grant the reversion to a stranger; in this case it is needful that the Lessee for ten years do attorn: But if the Lease for ten years be made without any reservation of rent, *contra*. For it is a rule. That where there is no tenure, attendancy, remainder, rent, or service to be paid or done, there attornment is not necessary. And hence it is, that where one doth grant common of pasture, appendant or appurtenant, or estovers out of land, that there needs no attornment of the Tenant to make this grant good. And if a rent or common be granted to one for life, and after the reversion of it be granted to another; that in this case there need no attornment to make this second grant good. And if one make a Lease to one for ten years, and then make a Lease to another for twenty years; in this case the second Lease is good for the ten years to come after the first ten years ended, without any attornment of the first Lessee.

And so
it was agreed in
M. 37; 38
Eliz. 3. R.

If a Lord exchange the services of his Tenant with another for land; in this case the attornment of the Tenant by whom the service is to be done, is necessary to perfect this exchange.

Perk. Sect.
249. 252.

If there be Lord and Tenant in fee simple, and the Tenant doth make a Lease to another man of the tenancy for life, and the Lord doth grant the Seigniorie to the Tenant for life in fee; in this case the Tenant in reversion must attorn to the Tenant for life upon this grant of reversion, or the grant is not good.

Lit. Sect.
562.

If I be seised of a reversion after an estate for years, and I grant it to the use of my self for life, and after to the use of another and his Heirs in fee, and after I grant my reversion for life to another; in this case it is needful that the Tenant for years attorn to this grant.

Hil. 8 Jac.

If a Lease be made to *I S* for his life, and afterwards another Lease is made of the same land to *I D* for his life; in this case it seems that *I S* must attorn to this second grant, or that the grant will not be good.

Dier 113.

An estate of Seignory cannot be gained by a disseisin, abatement or intrusion, without an attornment. And therefore if one disseise another of a Manor which is part in demesne and part in services, the services are not gained untill the Tenant attorn.

Lit. Sect.
587.

In all cases for the most part where there is no means provided by law to compel the Tenant to attorn, there their attornment in Law or in Deed is not necessary, unless there be some special default in the Grantee. *Quod remedio destituitur ipsa re valet si culpa absit*. And therefore an Attornment is not necessary in these cases following, *viz.* Where one doth grant a rent, reversion, remainder, service, or seignory to another by way of devise by a last will and testament, or by Letters Patents from the King, or where such

Co. 6. 68.
Lit. Sect.
589; 583.
586.
Co. super
Lit. 221. J
314.
F. N. B. 1
121. M

things

things are granted by matter of record from a Subject to the King. So when the thing granted doth pass by way of use and doth vest by force of the Statute of uses. As if one that is seised of land in fee doth make a Lease of it for life or years to I. S. and after levieth a Fine, or doth covenant to stand seised of the reversion of this land (or of the land it self, which is all one) to the use of another, or doth bargain and sell the reversion in fee, or for years; in these cases the Tenant need not to attorn: * But if A grant a reversion to B to the use of C, and the Deed is not enrolled, or the use arise not upon consideration of blood, &c. in this case if the Tenant do not attorn, the reversion will not pass. † If one by a common recovery suffered, grant a reversion to the use of himself, his Wife or Children; in this case there needs no Attornment of the Tenant by the Statute of 7 H. 6. cap. 4. ‡ So where one doth come to any such thing by title or seignory paramount, as by escheat, surrender, or forfeiture, or by descent; in all these cases and the rest, before the Attornment of the Tenant is to no purpose, neither to pass the thing as to the estate, nor to make a privy to distrain or bring action of debt. And therefore if there be Lord, Mesn. and Tenant, and the Mesn. grant the services of his Tenant by Fine to another in Fee, and after the Grantee dieth without Heir, in this case the services of the Mesnalty shall come to the Lord paramount, and he may distrain for them, or bring any action that lieth in privy for them without any Attornment. So if a Lessor for life of a Manor surrender his estate to the Lessor; there needs no Attornment of the Tenants of the Manor to make his estate to pass. So if the reversion of a Tenant for life be granted to another in Fee, and the Grantee die without Heir, so that the reversion escheat; in this case the Lord may distrain, or bring any action of waste &c. without any Attornment. So if a reversion descend to an Heir from his Ancestor, in this case it will vest in the Heir without Attornment, and Attornment in this case is not necessary. So if the Countess of a Statute Merchant extend a Seignory or rent for debt, the Seignory or rent shall be vested in him without any Attornment of the Tenant.

If a Copiholder in Fee make a Lease for years by licence of the Lord, rendering rent, and after surrender the reversion to the use of I. S. in this case it seems an Attornment of the Tenant is not needful, but I. S. shall have the rent without any Attornment.

If one grant the reversion of Copihold lands for life, or years, or grant the Seignory of Copihold lands of inheritance, in these cases there needs no Attornment of the Tenants to make the grants good. And so also is the law for an estate at will by the common law.

7 Co. 6. 68.
super Lit.
3m. 235.

* Agreed
in the
Court of
Wards.
Hil. 18.
Jac.
§ Calvin
case Pas.
7 Jac. 3. R.

† Lit. Sect.
383.
Hil. 18. 19.
Co. super
Lit. 321.

Co. super
Lit. 321.

Per 1 Just.
Trin. 4.
Jac. 3. R.

Curia M.
27. R. 38.
Hil. 18. R.
Co. 3. 38.
super Lit.
321.

If a Lease be made to one for life, the remainder to another in tail, the remainder over to the right Heirs of the Tenant for life, and the Tenant for life doth grant his remainder in Fee; in this case there needs no Attornment of the Tenant in tail, but the remainder will pass by the Deed presently without any Attornment at all. Lit. Sect. 573.

If one lease for life, the remainder for life, and after the Lessor release all his right in the land to him in remainder for life; in this case there needs no Attornment of the Lessee for life to perfect this release. Lit. Sect. 575.

If two Joyntenants or more make a Lease for life rendring rent, and one of them doth release the rent to the other; in this case there needs no Attornment to make the rent to pass. Lit. Sect. 574.

In all cases where the grant is in the personality there needs no Attornment. And therefore in grants of annuities which do charge the person of the Grantor only and not his land, there needs no Attornment. And in all cases where there is an Attornment in Law, there needs no Attornment in Deed. Agreed in Carnocks case. M. 3. Jac. Co. B.

3. By whom an Attornment may and must be made. Or not.

If there be Lord, Mesn, and Tenant, and the Lord grant the Fee of the Seignory; in this case the Mesn and not the Tenant must attorn. Lit. Sect. 555. 1

If one make a Lease for life, and then grant the reversion for life, and the Lessee attorn, and after the Lord grant the Seignory; in this case it seems the Grantee and not the first Lessee for life must attorn. Co. super. Lit. 3. 9.

If there be Lord and Tenant, and the Tenant make a gift in tail, or Lease for life of the land, and after the Lord grant the services to a stranger; in this case the Tenant for himself, and not the Tenant in tail, or for life must attorn: For it is a maxime in law, That no man shall attorn to any grant of any Seignory, Rent, Service, Reversion, or Remainder but he that is immediately privy to the Grantor. But the grant of a rent-seck or rent-charge issuing out of such land as before, the under-tenant in tail, or for life, and not immediate Tenant himself must attorn. Lit. Sect. 554, 556. Co. super. Lit. 3. 11.

If there be Tenant for life the remainder in Fee, and the Lord grant the services to a stranger; in this case the Tenant for life and not him in remainder must attorn. Lit. Sect. 556.

If there be Tenant for life, the remainder in tail, and he in the reversion after their estates doth grant his reversion to a stranger; in this case if either of them need to attorn, it must be the Tenant for life. Idem.

If a Woman that hath a Husband be to attorn, the Husband may and must do it for her, and the Attornment of the Husband for the Wife, whether it be expressed or implied, will binde the Wife. Co. super. Lit. 3. 12. Lit. Sect. 558.

Lit. Sect.

571.

Co. super

Lit. 316.

317.

Co. super

Lit. 312.

If one make a Lease for years of land the remainder for life, and after the Lessor doth grant the reversion, in this case the Tenant for life or years either of them may attorn.

If a rent charge be issuing out of land, and the Tenant be disseised of the land; in this case the Disseisor must attorn. But in case of the grant of a rent service, the Disseeisee may attorn if he will for the privity is between the Lord and the Disseeisee only.

Idem.

If a man make a Lease for life to I. S. of land, and after grant a rent charge out of it to I. D. and after he grant over this rent to another; in this case the Lessor, and not I. S. must attorn.

Co. super

Lit. 316.

8 E. 4. 80.

The Tenant in dower, after she hath assigned over her estate and not the Assignee must attorn to the grant of the reversion. And yet some hold that the Assignee also may attorn. The same law is also of the Tenant by the courtesie: but it is not so in other cases: For if the reversion of Lessee for life be granted, and Lessee for life assign over his estate, the Assignee and not the Lessee must attorn.

Co. super

Lit. 315.

If Lessee for life assign over his estate upon condition, and then the reversion is granted; in this case the Assignee and not the Lessee for life must attorn.

Co. super

Lit. 315.

Perk. Sect.

331.

If a Tenant in Fee simple that ought to attorn to a grant of a Seignior or rent, die before he make an Attornment, his heir must attorn, and an Attornment made by him is good. So if he grant away his land before he make his Attornment, his Grantee may attorn, and an Attornment made by him will be good enough.

Co. super

Lit. 312.

If a Lord of a Manor make a Lease of his Manor for life or years, and the Freeholders and others do attorn to the Lessee, and after he grant away the reversion of the Manor to a stranger; in this case the Lessee for life or years must attorn, and this will binde all the Freeholders.

Ibid.

If there be Lord and Tenant by Homage, Fealty and Rent, and the Tenant is disseised, and then the Lord granteth the rent to another; in this case the Disseisor and not the Disseeisee must attorn: but if he grant the whole Seignior, the Disseeisee may attorn.

Co. super

Lit. 315.

A voluntary Attornment where it is needful, may be made by an Infant, or one that is deaf and dumb (who may do it by signs.) But one that is *non compos mentis*, cannot make an Attornment.

Infant.

Non compos mentis.

Co. super

Lit. 310,

312.

The Attornment must always be made to the Grantee of the reversion, rent, &c. according to the Grant whether the Attornment be expressed or implied. But if divers do take by grant, the Attornment may be made to one of them, and this shall avail the rest, as if a reversion or a rent be granted to two or more, and the Tenant attorn to one of them; this is good to vest and settle the thing

6. To whom an Attornment may and must be made, Or not.

granted

granted in them all according to the grant. And if a Lease be made by Deed of a reversion to *A* for life, the remainder in Fee to *B*, and the Tenant attorn to *A*, this is a good Attornment to settle the remainder in *B*. But if the Tenant attorn to *B*, during the life of *A*, this is not good for *A*; howbeit if the Tenant for life die before the Attornment be made, in this case the Attornment may be made, and this shall be sufficient to perfect the grant of the remainder to *B*.

If I grant a reversion to one man, and before the Attornment of the Tenant had to perfect the grant, he doth sell this reversion to a third man; in this case the Tenant may attorn to the second Grantee, and this will make the grant good to him. But if the Attornment be made to both the Grantees, it is void for uncertainty.

Co. 6. 68.
11 H. 7. 12.

An Attornment may as well be made to *cisum quo use* of a reversion, as to the Grantee of the reversion himself. And it seems it must be made to him, and not to the Grantee of the reversion. For it was agreed in the Court of Wards, *Hil. 18. Jac.* That if a reversion be granted to *B* to the use of *C*, that the Attornment must be made to *C*, and not to *B*, who is but an instrument.

Co. Super
Lit. 340.
Harding-
case.

7. When and
at what time
the Attorn-
ment must be
made.

In all cases regularly where Attornment is necessary, it must be made in the life time of the parties Grantor and Grantee, or Exchangor or Exchangee: For if either of them die before the Attornment be made, the grant or exchange is void. And therefore if a Manor be granted and livery of seisin be given upon the Demesnes thereof, and one of the Tenants die before Attornment be made by him, his tenement will not pass, and the grant as to that part will be void; for in this case all the Tenants but Tenant at will must attorn. And albeit the grant of the reversion be to begin at a day to come, and after the death of either of the parties, yet must the Attornment be made in the life time of the parties, or otherwise the grant will not be good. And yet an Attornment may be made after the death of the Tenant by his Heir, and after the Conveyance of the Tenant by his Assignee.

Co. 1. 131.
Super Lit.
310.
Lit. Sect.
551.
Peik. Sect.
163, 130.
Co. Super
Lit. 385.
235.

If a Lease be made of a reversion to begin at a day to come, in this case the Attornment may be made before or after the day, so it be made in the life time of the parties.

Co. 2. 35.

If one grant his reversion of white acre or black acre, and the Tenant attorn to the grant before the Grantee have made his election which acre he will have, this is a good Attornment.

Co. Super
Lit. 310.

If a man grant his reversion by Deed to one, and after, and before the Tenant do attorn, he levy a Fine, or make a Feoffment of the land to another; in this case it seems the Attornment after comes too late: But if the Fine or Feoffment be but of part of the

Co. Super
Lit. 304.
310. & 311.
4. 67.
Kelw. 146.

the land granted before in reversion; in this case the first grant after Atturment shall be good for the residue. And if a woman sole grant a reversion, and after and before atturment she marry with a stranger, and after the Tenant atturn; in this case the Atturment comes too late: for the marriage is a countermand of it. And if a reversion of an estate for life or years be granted, and the Grantor before Atturment doth confirm the estate of the Tenant for life or years, and so change the estate, and after the Tenant atturn; in this case the Atturment comes too late.

To the making of a good Atturment where it is needful, divers things are required. 1. It must be made by the person that ought to make it. 2. It must be made to the person that ought to take it. 3. It must be made in time convenient. 4. If it be an exp^{re}s Atturment, the Tenant must first have notice of the grant of the reversion, rent, &c. to which he must atturn: but otherwise it is of an Atturment in law, for there notice in all cases is not necessary. 5. And it must be done in that manner the law doth prescribe. And for this it is to be known that it may be made by words or by Deeds, and without any writing, or by Deed or writing (and this is the safest way to do it.) And any words written or spoken by the Tenant, that do import an assent and agreement to the grant of the reversion, rent, &c. in such manner as the same is made after notice given to him of the Grant, whether it be in the presence or the absence of the Grantee of the reversion, rent, &c. will make a good Atturment in Deed. And therefore if the Tenant after knowledge of the Grant use these words following, or any others to the like effect to the Grantee, *viz.* I do atturn or turn Tenant to you according to the Grant; or, I become your Tenant; or, I agree to the Grant; or, I am well content with the Grant; or, God send you joy of it: these are good exp^{re}s Atturnments.

And if the Tenant after knowledge of the Grant, pay, do, or deliver all, or any part of the rent, or service, before, or at the time when the same is due to the Grantee, or give a penny, or farthing, an ox, or a knife, or any such like thing, or any other valuable thing in the name of Atturment, or in the name of feisin of the rent, this is a good exp^{re}s Atturment; and that Atturment which is made by words and deed or sign both, is the best for that doth leave a more deep impression in the mind of the witnesses. But if one have a rent-charge issuing out of my land, and he grant it to a stranger, and I give him an ox to put him in possession of the rent, it seems this is no good Atturment.

If a man grant his reversion of my living to I S and his Bayliff that doth use to gather his rents, saith to me, that I S hath bought it, and I must hereafter pay my rent to him, and I tell him I am glad of it, this is a good Atturment. And that albeit it be in the ab-

8. The manner of making an Atturment. And what shall be said a good Atturment. Or not. Notice.

Co Super
Lit. 309,
310, 315
Lit. Sect.
557.
Flow. 344.

Lit. Sect.
561, 553.
119.
Co Super
Lit. 315.
49 E. 3. 15.

M. a Car.
in the
Court of
Wards
Co. Super
Lit. 310.

sence of *I S.* And it is not material whether the stranger know of the Grant or not, so the Tenant know of it. And an Attornment made to the Lords Steward in the Court in the absence of the Lord is a good Attornment. For it is sufficient if the Tenant have notice, that he attorn to the Grant in the presence of any whomsoever. Tenant for life was, the remainder in tail, he in the remainder granted his remainder, the Tenant for life having notice of the Grant, saith to a stranger in his absence, That is the party, I am well pleased that the grant is made to him; it was adjudged to be good.

If a reversion be granted to one for life and after the same reversion be granted to him for years, and the Tenant attorn to both the Grants at once; this Attornment is void for uncertainty. So if one grant his Seigniorie to *I S.* Bishop of *London*, and his Heirs, by one Deed, and grant the same to *I S.* Bishop of *London* and his successors by another Deed, and the Tenant attorn to both grants at once, this Attornment is void for uncertainty. So if a reversion be granted to two several persons by several Deeds, and the Tenant attorn to both the grants at one time; this Attornment is void for uncertainty, and neither of the Grants are perfected by the Attornment in these cases. The implied Attornment which also doth amount to an express Attornment, is made divers manner of ways. For if the Tenant after notice of the grant of the reversion, pay his rent to the Grantee, or surrender his estate to the Grantee, or pray in aid of the Grantee, or accept a grant of the reversion or remainder from him that hath it, this is a good Attornment in law. But if the Tenant after the grant of the reversion, not having notice of the grant, pay his rent to the Grantee as a Receiver, Bayliff, &c. this is no good Attornment. And therefore if the Bailiff of a Manor shall purchase the Manor, or the reversion of one of the tenements, and the Tenant not knowing of the purchase, pay his rent to him, as he was wont to do, this is no good Attornment in law. So if a man seised of a Seigniorie, levy a Fine of it, and then take back an estate in Fee, and the Tenant having no notice of all this, doth pay his rent to the Conuſor as he was wont to do, this is no good Attornment in law to perfect either of these grants.

If there be Lord and Tenant, and the Tenant let the land to a woman for life, the remainder in Fee, and the woman doth take a Husband, after the Lord doth grant the services to the Husband in Fee, in this case this acceptance of the Deed by him that ought to attorn is a good Attornment in law. So if in this case the Tenant Lease to a man for life, the remainder over, and the Lord grant the services to the Tenant for life, and he accept thereof, this is a good Attornment in law.

If the Lord by Deed grant his Seigniorie to the Tenant of the land and to a stranger, and the Tenant doth accept of this Deed; this is

Curia B. R.
Hil. 11. Car.
B. R. Hil.
1001 case.

Co. super
Lit. 110.
11 H. 7. 12.

14 H. 8. 15.
34 H. 6. 41.

Co. super
Lit. 318.

Calvins
case. Ad-
judged.
Pasch. 7.
Jac. B. R.
Co. super
Lit. 309.
Go. 2. 67.
Dier 302.

Lit. Sect.
518, 560
&c.

Co. super
Lit. 513.

a good Attornment in Law to extinguish a moiety, and to vest the other moiety in the other Grantee. So if one make a Lease to *IS* for life, and after confirm his estate, the remainder over to *ID*, and the Lessee for life doth accept of the Deed of this confirmation and grant; this is a good Attornment in law, and doth vest the remainder in *ID*.

Co. super
Lit. 113.
Lit. Sect.
573.

If there be Lord and Tenant, and the Tenant take a Wife, and after the Lord doth grant the services to the Wife and her Heirs, and the Husband doth accept of the Deed of this Grant; this is a good Attornment in Law.

Lit. Sect.
564.

If the Conusee of a Fine of services sue a *Scire facias* to have execution of the services, and hath Judgement to recover; this is a good Attornment in law.

Co. super
Lit. 110.

If a woman grant a reversion to a man in Fee, and after marry with the Grantee, this is a good Attornment in law to perfect this grant made to the Husband.

Lit. Sect.
563.

If a Lord grant his Seigniori, and there be twenty manner of services and the Tenant with what intent soever it be, pay or perform in deed any parcel of the services to the Grantee; this is a good Attornment in law for all the services.

Lit. Sect.
576, 577.
Co. super
Lit. 119.
Dier. 112.
Co. 6. 68.
3. 113.

If I be seised of land in Fee, and make a Lease for life or years of it, or it be extended by a Statute or Elegit, and then I make a Feoffment of this land, and give livery of seisin upon it, and so put out the Tenant, and after the Tenant (or one of the Tenants, if there be many) re-enter; this is a good Attornment in law. And so also it seems is the law if the Lessee for life recover in an assise. But if a man make a Lease for life, and then the Lessor grant the reversion for life, and the Lessee attorn, and after the Lessor enter and make a Feoffment in Fee, and so disseise the Lessee for life, and then the Lessee reenter; this is no good Attornment in law by the Grantee for life. And if the Conusee of a reversion by fine disseise the Lessee for life, and make a Feoffment in Fee, and the Lessee reenter, this is no good Attornment in law to the Feoffee to enable him to distrain, &c.

Hil. 8 Jac.

If one grant the reversion of a Lease of a term of years, and before any Attornment made, the Lessee for years doth grant his term to the Grantee of the reversion, in this case this is no good Attornment in law, to make the reversion to pass.

Perk. sect.
291.

If one have land, and a rent issuing out of other land, both in one County, and he grant both by Deed, and give livery of seisin of the land, in the name both of the land and of the rent; this is no good Attornment in law, to make the grant of the rent good.

So was it
held in
Broken-
bury and
Martials
case. 5 El.

If Lessee for life or years, subscribe his name as a witness to the sealing and delivery of the grant of the reversion, made by the Lessor to a stranger; this is no good Attornment in law, for he may do this, and not have notice; But if he have notice of the Grant, and then

then put his hand to it; this is an Atturment, *Curio B. R. H. 1. 1. Car.*

Atturment
to part of the
grant, good
for the whole.

If a reversion be granted of two acres, or for forty years, or if services be granted, and the Tenant doth attur for one acre, or for part of the forty years, or for part of the services, this shall extend to all, and is a good Atturment for both the acres, all the forty years and all the services. And that albeit the Tenant say expressly it shall be good but for a part, and not for the whole. And so also it is of an Atturment in Law. And therefore if the Grantee by fine of services, sue a *Scire facias* to have execution of any part of the services, and have judgement to recover any part, or a Lessee of three acres surrender one of them to the Grantee of the reversion of all the three acres; this is a good Atturment of the whole. But if one attur for part of the land, or for part of the services in case of the Grant of a reversion of land, or the grant of services, and have no notice of the grant of any more, this Atturment is not good for any part, but void for all.

Co. 11 68,
super Lit.
297. 114.
302.
Lit. Scd.
564.

Atturment
to one, good to
others.

If a Seignior, Reversion, or the like be granted to two or more, and the Tenant after notice thereof doth attur to one of them; this is a good Atturment to perfect the Grant to both, or all of them. But if one die before Atturment, and the Tenant attur to the survivor or survivors; this shall not avail the Heir of him that is dead, but it is good to perfect the grant to the survivor or survivors, to whom it is made.

Co. super
Lit. 297. 2.
18 67.

If a reversion be granted to Husband and Wife, and the Tenant attur to his Wife in the absence of the Husband; this is a good Atturment to perfect the Grant to them both. But if a reversion be granted to two men, and the Tenant have notice onely of a Grant made to one of them, and he attur to him onely; this Atturment is void, and not good to perfect the grant to either of them.

Calvin's
case Pasf.
71 c. B. R.
Co. 2. 68

Atturment
by one, good
for others.

If two Joyntenants be for life, or years, and the reversion of their estate is granted to a stranger, and one of them attur to the Grant of the reversion; this is a good Atturment for both of them. The like Law is for Tenants in common. But if *A, B, C,* and *D* be Lessees for years, and *C* and *D* be outlawed, so as they forfeit their parts to the King, and the King become Tenant in common with *A* and *B*, and after the reversion is granted to a stranger, and *A, B, C,* and *D* attur; this is no good Atturment to perfect the grant of the reversion, for *C* and *D* cannot attur, and the Atturment of *A* and *B* for the King and themselves is not good.

Co. 2. 66.
67.
Lit. Scd.
566.

6. Car. in
the Lord
Brooks
case in the
Court of
Wards.

9. Who shall be compelled to see before at *Num. 5*:
return. Or not.
And where.

Atturment made by the Husband is good for the Wife: whereof
In all cases for the most part, where Atturment is needful, the
Tenant whether he be Tenant in Fee simple, for life, years, by Sta-
ture;

Co. 2. 68. 2.
84. super
Lit. 315.

tute, Elegit, or as Executor until debts be paid, and shall be compelled to attorn. And albeit the Tenant be an Infant, and come to the land by purchase or descent, yet may he be compelled to attorn, but then in this case his Attornment shall not prejudice him, for when he is of full age he may disclaim or say he doth hold by less services.

Co. Super
Lit. 316,
318.

If there be Tenant in tail of a reversion, and he grant this over to a stranger; in this case the Tenant in possession may be compelled to attorn. But if the reversion upon the estate of the Tenant in tail, or upon the estate of the Tenant in tail after possibility of issue extinct be granted, such a Tenant may not be compelled to attorn; and yet such a Tenant may attorn *gratis* if he will. And the Assignee of the estate of such a Tenant in tail after possibility, &c. is compellable to attorn. And if one make a gift in tail, the remainder in Fee, and the Seignior, or a rent-charge issuing out of the land, is granted in Fee by Fine; in this case the Tenant in tail may be compelled to attorn.

Co. 6. 68.
Super Lit.
318.

In all cases for the most part where Attornment is not needful there is no means to compel the Tenant to attorn. And therefore the Tenant cannot be compelled to attorn to him that comes to a reversion or remainder by Escheat, Forfeiture, &c.

Co. Super
Lit. 118.
316.

If one grant his reversion of land in Mortmain without a licence, the Tenant may not be compelled to attorn until there be a licence had from the King.

Co. Idem.

Also it is a general rule, that when the grant by Fine is defeasible, there the Tenant shall not be compelled to attorn. As if an Infant levy a Fine, this is defeasible by writ of Error during his minority, and therefore the Tenant shall not be compelled to attorn. So if the land be holden in ancient demesne, and he in the reversion levieth a Fine of the reversion at the Common Law; the Tenant shall not be compelled to attorn, because the estate that passeth is reverfable by Writ of Deceit.

Co. Super
Lit. 309,
310. 297.
See before

If the Grant be absolute, and the Attornment be on Condition; yet this shall enure according to the grant. So if the Attornment be but to part of the things, or part of the time granted; this shall enure to perfect the grant for all. So if the Attornment be made but to one of the Grantees, it shall enure to the rest. So if the Attornment be made to the particular Tenant, it shall enure to him in the remainder to perfect his estate also.

Co. Super
Lit. 320.

If the estate of the Tenant be with a privilege annexed, as without impeachment of waste, or the like, and the Tenant attorn generally without any saving of his privilege, if the Attornment be *gratis* and voluntary, whether it be an Attornment in Law or in Deed; this shall not enure to extinguish his privilege: but if the Attornment be made by the compulsion of a Writ in this man-

10. How an
Attornment
shall enure;
and be taken.

ner.

ner, and without this saying, he hath lost his priviledge for ever.

If a reversion, &c. be granted to two several men one after another, and he that hath the latter Grant get the Atturment of the Tenant to his Grant before the other; in this case this shal enure to perfect the latter, and the first Grant now cannot be made good.

Co. super
Lit. 310.

If a reversion be granted to a man and woman unmarried, and before Atturment made they entermarry, and then the Tenant atturn; in this case they shall have the estate by moities.

Co. Idem.

11. How an atturment shal relate.

An Atturment as to the party, Grantor, shall have relation to the time of the grant, to make the thing to pass out of the Grantor *ab initio*, albeit it be made many years after the grant, and therefore all acts done by him after the time of the Grant, and before the Atturment to the prejudice of his own grant, as granting of rents, entering into Statutes, or the like, are void, as to the land to charge it: and hence it is, that if a reversion be granted to an alien, and before Atturment of the Tenant he is made Denizen; in this case the King upon Office found shall have the land, and yet it shall not so relate as to make the Tenants chargeable to the Grantee for any mean arrearages, or for any waste in the lands for the time of the grant to the time of the Atturment. But in respect of a stranger it shall not relate at all. And therefore if two Deeds be of a reversion at several times, and he whose Deed was made last, gets Atturment first, the reversion doth pass to him, and though the other get Atturment afterwards, yet this will not help him by relation, and albeit the former grant of the reversion be in Fee, and the latter for life only, yet the law will be all one in both cases.

Co. Idem.

And now having done with this, we come to a *Lease*.

CHAP. XIV.

Of a Lease.

1. Quid.

Assignment.

Lessor, Lessee.

A Lease doth properly signifie a demise or letting of lands, rent, common, or any hereditament unto another for a lesser time then he that doth let it hath in it. (For when a Lessee for life or years doth grant over all his estate or time unto another, this is more properly called an Assignment then a Lease.) And this albeit it may be made and done by other words, yet it is most commonly and aply made by the words Demise, Grant, and Let. And in this case he that letteth is called the Lessor, and he to whom it is let the Lessee. This word also is sometimes although improperly applied to the estate, i. the title, time, or interest the Lessee hath to the

Terms of
the Law.
Co. super
Lit. 43. 44.
Justice Do-
tridge
Treatise,
called the
use of the
Law.
Bro. leases
60. 437.
Plow 421.
432. Dier
125.

thing

thing demised, and then it is rather referred to the thing taken or had, and the interest of the taker therein: but in this place it is applied rather to the manner or means of attaining or coming to the thing letten. And in this sense it is sometimes made and done by Record, as Fine, Recovery, &c. and sometimes and most frequently by writing called a Lease by Indenture, albeit it may be made also by Deed poll. And sometimes also it is (as it may be of land or any such like thing grantable without Deed for life, and never so many years) by word of mouth without any writing, and then it is called a Lease-parol. And hence comes the division of a Lease-parol, and a Lease in writing. And all these wayes it may be made either for life, *i.* for the life of the Lessee, or another, or both, or for years, *i.* for a certain number of years, as ten, an hundred, a thousand, or ten thousand years, moneths, weeks, or days, as the Lessor and Lessee do agree. And then the estate is properly called a term of years: for this word Term, doth not onely signifie the limits and limitation of time, but also the estate and interest that doth pass for that time: These Leases also for years, do some of them commence *in presenti*, and some *in futuro*, at a day to come; and the Lease that is to begin *in futuro*, is called an *interesse termini*, or future interest. Or at will, *i.* when a Lease is made of land to be held at the will and pleasure of the Lessor, or at the will and pleasure of the Lessor and Lessee together: and such a Lease may be made by word of mouth as well as the former.

Quotuplex.

Term of years

Interesse termini, or future interest.

See Grant
Numb. 4.
Co. 6. 26.
34. 35. 1.
154. 155.
Co. Super
Lit. 45. 46.
Plow. 173.
393.

Regularly these things must concur to the making of every good Lease. 1. As in other Grants, so in this there must be a Lessor, and he must be a person able, and not restrained to make that Lease. 2. There must be a Lessee, and he must be capable of the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demisable. 4. If the thing demised be not grantable without a Deed, or the party demising not able to grant without Deed, the Lease must be made by Deed: And if so, then there must be a sufficient description, and setting forth of the person of the Lessor, Lessee, and the thing leased, and all necessary circumstances, as sealing, delivery, &c. required in other grants must be observed. 5. If it be a Lease for years, it must have a certain commencement, at least then when it comes to take effect in interest or possession, and a certain determination either by an express enumeration of years, or by reference to a certainty that is exprest, or by reducing it to a certainty upon some contingent precedent by matter *ex post facto*, and then the contingent must happen before the death of the Lessor or Lessee. 6. There must be all needful ceremonies, as livery of seisin, Attornment, and the like, in cases where they are requisite. 7. There must be an acceptance of the thing demised, and the estate by the Lessee. But whether any rent.

3. Things necessarily required in every good Lease.

rent be reserved upon a Lease for life, years, or at will, or not, is not material, except onely in the cases of Leases made by Tenant in tail, Husband and Wife, and Ecclesiastical persons. Of which see *infra*.

4. what shall be said a good and sufficient Lease for life or years. Or not.

1. In respect of the persons of the Lessor and the Lessee, the thing leased, and the estate, property, or possession of the Lessor therein.

For the ability and capacity of the Lessors and Lessees, and what shall be said a good Lease or not, in respect of the ability of the Lessor and the capacity of the Lessee, and the description of their persons, the nature and description of the thing demised, and what mis-recital, or misnomer will hurt, or not. See *Grant. Numb. 4.* and *infra, Numb. 5, 6, 7.*

Leases for life, or years, or at will, may be made of any thing corporal or incorporeal, that lieth in livery or grant. Also Leases for years may be made of any Goods or Chattels. See for this *Grant Numb. 4.*

A man seised of an estate in Fee simple in his own right of any lands or tenements, may by Deed or writing in the Country, or without writing by word of mouth, make a Lease of it for what lives or years he will. And he that is seised of an estate in tail of any Lands or Tenements, may make any Lease out of it for his own life, but not longer, unless it be by Fine or Recovery, or it be such a Lease as is warranted by the Statute of 32 H. 8. (whereof see more *infra*) And he that is seised of Lands or Tenements of any estate for his own or anothers life, may make what Lease for years he will of it, and it will be good as long as the Lease for life doth last. And he that is possessed of lands or tenements for years, may make a Lease of it for all or part of the years, and these are good Leases. The Tenant for life or years, may also assign over all their estates if they please. And if such Tenants make Leases for longer time, as if Lessee for years make a Lease for life; it seems by this the land will pass for life, if the term of years last so long. But if he give livery of seisin upon it (as he must to make the Lease for life good) this is a forfeiture of the estate for years.

Forfeiture.
Infant.

If an infant be seised of land in Fee simple, and he make a Lease for years of it rendering no rent; this Lease is void. But if there be a rent reserved upon the Lease, then the Lease is but voidable, and may by the acceptance of the rent by the infant after his full age, be made good.

Acceptance.

Joyn tenants.
Tenants in
common.

Joyn tenants, Tenants in common, and Parcenots may make Leases for life or years of their own parts, and purparties at their pleasures, and these Leases will binde their companions. And one Coparcenor or Tenant in common may make a Lease of his part to his companion if he will.

If a Feoffment be made upon condition, and before the time of performance of the condition, the Feoffor and Feoffee do joyn to make a Lease for life or years of the land; this is a good Lease.

Bro. Leases
23

Co. 7. 12.
1. 44.
Plow. 514.

9 H. 7. 24.
18 Ed. 4. 1.
Plow. 515.

Lit. cap.
Tenant in
common
F. N. B. 62.
G.

Bro. Leases
38.

A man that hath an estate in land to him and his Wife and his Heirs, may make what Lease he will of the land, and this will be good against all men but his Wife onely, and that for her time.

Co. 10. 49.

If there be Lessor in Fee, and Lessee for ten years, in this case they two may joyn together and make a Lease for lives, or for any term of years, and this is good.

Flow.

A Disseisee cannot make a Lease of that land whereof he is dis-

Bro. Scire
facias. 36.

seised, until he make his entry, or recover the possession of the land again. So neither can a woman that hath recovered the third part of her Husbands lands in a Writ of Dower, make any Lease of it before she be in possession by execution. And yet if a Lease be made

Co. Super
Lit. 46.

to me for years, I may make a Lease of part, or an assignment of all the term before I have made my entry into the land demised. So

Flow. 137.
140.

if the Father die, and the Son make a Lease to a stranger of the land descended to him before his entry, this is a good Lease: but if a stranger had entred and abated into the land, and then the son had made the Lease, *contra*.

Co. 5. 5.
Dier. 357.
Co. 6. 2. 6.
70. 1. 175.
See in Leases made
by Tenant
in tail, in
fra.

In some cases also such persons as are not seised in Fee simple, &c. nor able to derive such estates for life or years out of their own estates, may lawfully notwithstanding make such Leases for life, &c. And this is sometimes by some special Act of Parliament enabling them so to do. And hence it is also that a Tenant in tail may make Leases for three lives, or twenty one years. And sometimes it is by some special power or authority that is given or reserved by and to the party himself that had the Fee simple in him, or given to some other to do it in his name, and Leases thus made may be good. And therefore if any Act of Parliament enable a Tenant in tail or a Tenant for life to make Leases for three lives, or twenty one years, Leases that are so made in pursuit of that authority, are good. And if a man be seised of land in Fee, and convey it to the use of himself for life, or in tail with divers remainders over, with a proviso that it shall be lawful for him or any such Tenant in tail to make Leases for twenty one years; in this case he or they may make such Leases, and they will be good. But in both these cases care must be had to pursue the authority strictly, & that the Leases made be according to the power and direction given by the Statute or Proviso: For if it differ and vary ever so little from the sense and meaning of the same, the Lease will not be good. And therefore in the case before of a power to make Leases for twenty one years, if the party make more Leases for twenty one years at one time than one, they are all void but the first, because it is against the intent of the parties, though it be not against the words. And so if the power be to make Leases for three lives, he cannot by this make a Lease for ninety nine years if three lives so long live. But if the power be thus, Provided, &c. that he may make any Lease in possession

By special
power or pro-
viso to make
Leases.

possession

Averment.

fion or reversion, so as it do not exceed the number of three lives, or twenty one years; in this case a Lease may be made for ninety nine years, if three lives live so long. But where uses are raised by way of Covenant, and in the Deed there is a proviso that the Covenantor for divers good considerations may make Leases for years; in this case this power is void, and therefore no Lease can be made hereupon: neither will any averment help in this case. And if a man have a Letter of Attorney, or other authority to make Leases for another, and do make them accordingly; such Leases are good. But herein also caution must be had of three things: 1. That the authority be good. 2. That he that is the Deputy or Attorney, do pursue the authority strictly. 3. That he do it in the name of his Master and not in his own name. Co. 9. 76.

2. In respect of the manner of the agreement and the words whereby the same is set down. And what words will make an estate for life or years.

A Lease made for a thousand days, moneths or weeks, it is as good for so long as it endureth, as a Lease for an hundred or a thousand years. So a Lease for half a year, or a whole year is good. So if a Lease be made from day to day, or from week to week for four years; this is a good Lease for four yers, *Et sic de similibus*. So if one make a Lease for ten years, and so from ten years to ten years, during an hundred years, or untill an hundred years are incurred; this is a good Lease for one hundred years: So if one make a Lease from three years to three years during the life of *I S.* in this case if livery of seisin be not given, this is a good Lease for six years, but if livery be given it is a good Lease for the life of *I S.* And if a Lease be made from my death until *Anno Domini* 1650. this is a good Lease. Co. 6. 72. 14 H. 8. 13. Plow. 422. Plow. 371. Bro. leais 49. Dier 24.]

Livery of seisin.

Livery of seisin.

If I say to *I S.* being in my house [Here *I S.* I demise to you my house and land so long as I live;] this is a good Lease for life to him if livery of seisin be made. Co. 6. 26.

Livery of seisin.

If one make me a Lease of Land untill an hundred pound be paid me, and make livery of seisin upon it: this is a good Lease for life determinable upon the payment of the hundred pound. But if no livery be made it is no good Lease. *Et sic de similibus*. 21 Aff. pl.

Executor.

If one make a Lease to me for my life, and for four, ten, or twenty years after; this is a good Lease for life, first if livery of seisin be made, and then a good Lease for years, for so many years as are agreed upon afterwards, which my executors shall have. And if no livery of seisin be made, yet it seems it is a good Lease for so many years after my death. Bro. leais 27. 51.

If an Indenture of Lease be made between *A* of the one part, and *B, C* and *D*, of the other part, and therein *A* doth demise land to *B*, to have and to hold to him for eighty years, if *B* shall live so long, and if he die, or alien the premises within the term, then that his estate shall cease, and then the Lessor doth grant the land to *C* for so many years of the said term as shall be then to come after the Co. 2. 151. Dier 255.

the death or alienation of B. if he live so long; in this case this is a good Lease to B. for so many years as he shall live of the eighty years, but the Lease to C. after is not good, for the term is ended by the death of B. But if the words of the second demise be To have and to hold during the residue of the eighty years, and not during the residue of the term; in this case the second demise is good to C. also.

Co. 1. 145.
Dier 150.
353.

If one make me a Lease for sixty years if I live so long, provided that if I dye within the term, that my Executors shall have it during the residue of the sixty years; in this case this is a good Lease for the sixty years determinable upon my death, but not a good Lease for the residue of the sixty years after my death. And yet it may amount to a good covenant for that time.

Exams case
Trin. 5.
Jac. B. R.

If A. covenant to levy a Fine to B. and his Heirs, provided that if he pay B. and his Heirs ten pound at the end of thirteen years, that then the Fine shall be to the use of A. and his Heirs, and A. doth covenant with B. by the same Deed, that B. his Heirs, Executors and Assigns, shall quietly hold the premises from Michaelmas next for thirteen years, and yearly from thenceforth for ever, if the ten pound be not paid according to the intent; in this case this covenant doth not make a good Lease for the thirteen years, and it is but a covenant.

Flow. 373
Lit. Sect.

If one make a Lease for a certain number of years, and it is further agreed that upon some contingent the Lessee shall have the Fee simple and livery of seisin is given hereupon; in this case the Lease for years doth continue good for the time agreed upon.

Co. 2. 24.
1089.

A Lease for years cannot by the agreement of the parties be made to the Heirs of the Lessee, nor intailed to the Heirs of his body. And therefore if a Lease be made to I. S. and his Heirs, or to I. S. and the Heirs male of his body, yet the Executors of I. S. and not his Heirs shall have it, and the Executors may sell the term.

Per Justice
Jones at
the Assizes
at Glouc.

If two agree by word that one of them shall have such a piece of land for twenty years; this is a good and perfect Lease that is made by this agreement, albeit they do agree to have a writing made of it afterwards; for in this case the writing is but the confirmation of it. But if the agreement be that such a writing shall be made, or that a Lease shall be made of such a thing between them and put in writing, so that the agreement hath reference to the writing; and implieth an intent not to perfect the agreement till the writing be made; in this case the Lease is not a perfect Lease until the writing be made.

Co. Super.
Lit. F. N.
E. 270. E.
Who. Leases

Albeit the most usual and proper making of a Lease is by the words, Demise, Grant, and to farm let, and with an *Habendum* for life or years, yet a Lease may be made by other words, for whatsoever word will amount to a grant, will amount to a Lease. And there-

therefore a Lease may be made by the word, Give, Beake, or the like. The word *Leaseth* also is a good word. And the use in the Exchequer is to make Leases by the word *Committimus*, which is a good word to make a Lease. And if *A* do but grant and covenant with *B*, that *B* shall enjoy such a piece of land for twenty years, this is a good Lease for twenty years. So if *A* promise to *B* to suffer him to enjoy such a piece of land for twenty years, this is a good Lease for twenty years. So if *A* licence *B* to enjoy such a piece of land for twenty years, this is a good Lease for twenty years. And therefore it is the common course, if a man make a Feoffment in Fee, or other estate upon condition that if such a thing be or be not done at such a time, that the Feoffor, or shall re-enter, to the end that in this case the Feoffor, or may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time. And this Covenant in this case will make a good Lease for that time, if the uncertainty of the time (whereunto case must be had) do not make it void. And therefore if *A* bargain and sell his land to *B* on condition to re-enter, if he pay him an hundred pound, and *B* doth covenant with *A* that he will not take the profits until default of payment, or that *A* shall take the profits until default of payment: In this case, howbeit this may be a good Covenant, yet it is no good Lease. And if the Mortgagee covenant with the Mortgagor, that he will not take the profits of the land until the day of payment of the money: in this case albeit the time be certain, yet this is no good Lease, but a Covenant onely. If one give a Bond for the quiet holding of one Close for three years: it seems this is no Lease in Law. See the opinion of the Parliament for *Bonds* and *Covenants* both, *Stat. 14. Eliz. cap. 11.*

A Lease for years may begin at a day to come, as at Michaelmas next or three or ten years after, or after the death of the Lessor or of *J. S.*; and it is as good as where it doth begin presently. But a Lease for life of any thing whatsoever, whether it be in livery or in grant, if it be in *fe.* before, cannot begin at a day to come. And therefore if a Lease be made *habundant*, from Michaelmas next, or from the day of the making it, or after the death of the Lessor, or after the death of *J. S.* to the Lessee for life, this Lease is not good: but in case of a Lease of land made thus, it is sometimes holden by the Livery of seisin. For which see *Livery of seisin, cap. 1. dom. 11.* But all Leases for years, whether they begin in *present*, or in *future*, must be certain, that is, they must have a certain beginning, and certain ending, and so the continuance of the term must be certain, otherwife they are not good. And so if the years be certain when the Lease is to take effect in interest or possession, it is sufficient: For until that time it may depend upon an uncertainty, viz. upon

Bro. Leases 60.

Mic. 94a. B. R. curia.

5 H. 7. c.

Agreed by all the Judges

Mic. 10.

Jac. & pet.

Ju. Bridgman. And

8 Car. 1. l.

Covenant.

3. In respect of the Commencement, and continuance and end of the term or estate, Incertainty.

Co. 5. l.

Super. lit.

48.

Plow. 156.

257.

11. 11.

11. 11.

Co. Sup.

Lit. 45.

Co. 2. l. 3.

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11. 11.

a possible contingent precedent before it begin in possession or interest, or upon a limitation or condition subsequent; but in case when it is to be reduced to a certainty upon a contingent precedent, the contingent must happen in the lives of the parties. And albeit there appeare no certainty of yeares in the lease, yet if by reference to a certainty it may be made certain, it is sufficient.

Co. Super.
Lit. 45.
Plow. 89.
324. Co. 6.
35. l. 155.

Id certum est quod certum reddi potest. As for examples, if A seised of lands in Fee grant to B, that when B shall pay to A. twenty shillings, that from thenceforth he shall hold the land for twenty one years, and after B doth pay the twenty shillings; in this case B shall have a good lease for twenty one years from thence forth. And if A grant to B, that if his tenant for life shall die, that B shall have the land for ten years; this is a good lease. And if one make a lease for years after the death of C, if C die within ten years; this

Plow 370.

is a good lease if C die within the ten years; otherwise not. But if A be seised of land in Fee, and lease it to B for ten years; and it is agreed between them that B shall pay to A an hundred pound at the end of the said ten years, and that if he do so; and shall pay the said hundred pound, and an hundred pound at the end of every ten years, that then the said B shall have a perpetual demise and grant of the premises from ten years to ten years continually following *extra memoriam hominum, &c.* in this case this albeit it be a good lease for the first ten years, yet it is void for all the rest for incertainty. And if a lease be made to begin from the Nativity of Christ, and he doth not say which Nativity as next, &c. it is void for incertainty. And yet if a lease for years be made of land in lease for life, To have and to hold from the death of the tenant for life; this is a good lease. So if it be, To have and to hold from *Michaelmas* next after the death of the Tenant for life, or from *Michaelmas* next after the determination of the estate of the tenant for life; these are good leases. So if there be a former lease in being for life or years, and another lease for years is made of the land, To have and to hold from the end of the former estate by surrender, forfeiture or otherwise for twenty years; or to have and to hold from the surrender, forfeiture, or other determination of the former lease if there be any, and if there be none for twenty years; these and such like leases are good, and this commencement is certain enough. And if one make a lease to begin after the death of

Hil. 16.
Jacin the
Exchequer
Plow 192.
92.

IS, and to continue untill *Michaelmas*, which shall be in *Anno Domini* 1650. this is a good lease.

Co. 6. 36.

If a man have a lease of land for an hundred years, and he make a lease of this land to another to have and to hold to him for 40 years to begin after his death; this is a good lease for the whole forty years, if there shall be so many of the hundred years to come at the time of the death of the lessor. But if the lessor grant the land to

Plow 55.
& 17. Jac.
B. R. A.
gree.
Lit. Bro.
Sect. 437
Bro. Grant
354. Co. 1.
359. Plow
320, 321.
See Expo-
sition of
Deeds.

T

ano-

another, To have and to hold to him for and during all the residue of the term of an hundred years that shall be to come at the time of the death of the grantor; this is void for incertainty. And yet if in this case he grant withal all his estate, or all his term, or all his interest in the premises of the deed, and then say, To have and to hold the land, &c. to the grantee for all the residue of the term of an hundred years that shall be to come at the time of his death; by this the whole estate & interest of the grantor into the land doth pass presently by these words in the premises of the deed. And if in this case the lessee for an hundred years make a lease of the land to have and to hold after his death for an hundred years; this will be a good lease for as many of the first hundred years as shall be to come at the time of his death.

If A make a lease to B for ninety years to begin after the death of A, on condition to be avoided upon the doing of divers acts by others, and afterwards makes another lease of the land *Habendum* after the determination or redemption of the former lease; it seems this is a good lease and certain enough. But if a lease be made to A for eighty years if he live so long, and if he die within the said term, or alien the premises, that then his estate shall cease, & then he doth further by the same deed grant and let the premises for so many years as shall then remain unexpired after the death of A, or alienation to B for the residue of the said term of eighty years, if he shall live so long; in this case the lease to B is void: for after the death of A the term is at an end; bet if he say for the residue of the eighty years, it is otherwise.

If A doth make a lease of land to B, for so many years as B hath in the Manor of Dale, and B hath then a lease for ten years of the Manor of Dale, in this case this is a good lease for ten years. But if A make a lease of land to B for so many years as B hath in execution the land shall be in execution; this lease is void for incertainty. And if a lease be made during the Minority of I S, or until I S shall come to the age of twenty one years; these are good leases; and if I S die before he come to his full age, the lease is ended. But if a lease be made to another *unill* a child that now is in its mothers belly shall come to the age of twenty one years; this lease is not good. And if a lease be made for so many years as I S shall name; in this case if I S do name a certain number of years in the life time of the party lessor, this is a good lease. But if a lease be made for so many years as the executor of the lessor, or of the lessee shall name; this lease is void.

If a man make a lease for twenty one years, if I S live so long, or if the coverture between I S and D S shall so long continue, or if I S shall continue to be parson of Dale so long; these and such like leases are good. But if A make a lease to B for so many years as A and

Per Justice
Bridgman.

Co. 4. 153
Dier. 253.

Plow. 273
523. 522.
F. N. B. 6.
N. 14 H.
8. 11. Co.
6. 35.

Go super-
Lix. 45.
Plow. 273

and *B*, or either of them shall live, not naming any certain number of years; this cannot be a good lease for years. So if the Parson of Dale make a lease of his glebe for so many years, as he shall be Parson there; this is not certain, neither can it be made so by any means. And yet if a Parson shall make a lease from three years to three years so long as he shall be Parson; this is a good lease for six years, if he continue Parson so long, and for the residue void for incertainty. So if I make another a lease of land untill he be promoted to a Benefice; this is no good lease for years, but void for incertainty.

Co 6. 35.
14. H 8 10
Plow 274.

If I have a rent-charge of twenty pound *per annum*, and let it to another, untill he have levied an hundred pound; this is a good lease for five years. But if I have a piece of land of the value of twenty pound *per annum*, and I make a lease of it to another untill he shall levy out of the profits thereof an hundred pound; this is no good lease for years, but void for incertainty.

Plow 27.
Co 6 35.

But here note, in all these cases of incertain leases made with such limitations as afore said, as untill such a thing be done, or so long as such a thing continue, &c. that if livery of seisin be made upon them, they may be good leases for life, determinable on these contingents, albeit they be no good leases for years.

Note.

Co Super
Lit. 46.
10 Ed. 2.
26.

And in some special cases a lease may be good notwithstanding some incertainty in the continuance of it, for a lease may cease for a time, and revive again, as if tenant in tail make a lease for years reserving twenty shillings, and after take a wife and die without issue; in this case as to him in reversion the lease is meerly void, but if he endow the wife of the tenant in tail of the land as to the wife, it is revived again. So if tenant in tail make a lease for years rendring rent, and die without issue, his wife enseint with a son, and he in reversion enter, in this case as against him the lease is void, but after the son is born, the lease is good again if it be within the statute. So if tenant in Fee simple take a wife, and then make a lease for years and dieth; the wife is indowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again.

Plow. 423.
421. 273.
Co. 1 155.
Bro Leases
72. 10.
Plow. 511.
Co. 4. 55.

If a lease be made for life or years to *A*, and after the lessor doth make a lease for years by word or in writing to *B*; regularly this concurrent lease to *B*, is a good lease at least for so many years of the second lease, as shall be to come after the first lease is determined according to the agreement, as if the first lease to *A* be for twenty years, and the second lease to *B* be for thirty years, and both begin at one time; in this case the second lease is good for the last ten years. And yet the reversion will not pass without the attornment of the tenant, and therefore if any rent be reserved on the first lease, the second lessee shall not have it untill the first lessee doth attorn. But if the second lease be for the same or for a less

4 In respect of another lease then in being of the same thing.

time, as if the first lease be for twenty years, and the second lease be for twenty, or for ten years to begin at the same time; these second leases are for the most part void. And yet herein a difference is taken between leases made by matter of record, and by writing, and leases that are made by word of mouth: for if the second lease be made by fine, deed indented, or poll, albeit it be but for the same or for a lesser time, and albeit it be a lease of the land itself, and not of the reversion, yet it will pass the rent reserved upon the first lease, if the first lessee attorn, and so also it will do without attornment, where attornment is not needfull. But if the second lease be made by word of mouth, it is otherwise, for a reversion and a rent in this case will not pass without deed, and therefore a grant by word doth not pass them. And if the second lease be by fine or deed indented, then also it will work by way of estoppel, both against the lessor and against the lessee, so that if the first lease happen by any means, as by surrender, or otherwise, to determine before it be run out, then the second lessee shall have it; and if there be any rent reserved upon the second lease, the lessee must pay it from the time of the making of the lease. And therefore if one make a lease of land to *A* for ten years, and after make a lease to *B* of the same land from *Michaelmas* next for ten years, and before *Michaelmas* the first lessee doth purchase the Fee simple, so that now by this means his term is drowned; in this case the second lease shall begin at *Michaelmas*. So if one make a lease to *A* for twenty years, and *A* make a lease of the land to *B* for two years rendering rent, and after *A* makes a lease for the rest of his time to *C* by Deed; this lease, if the lessee for two years do attorn, is a good lease of the rent and reversion; and so it is also without Attornment, if there be any consideration given for it, for then it is also a good lease for all the rest of the term after the two years. So if one make a lease to *A* for twenty years, if he live so long rendering rent, and after he doth make a lease to *B* by Indenture for eighty years, to begin presently, or grant the reversion to begin at a day past, or the like; in all these cases, if the first lessee attorne, the rent will pass, but if not, it will be a good lease for the land, for so many of the yeares as shall be to come after the first Lease ended. But if the second Lease bee by Paroll without a Deed, the reversion as a reversion will not pass, and the grant will be void, if there be nothing else to help it. And in cases where the second lease is void, albeit the first Lessee surrender his estate, or his estate end by a condition; yet the second lease is not hereby made good. But if the second Lease for years after another lease for life or years be made for money, so as it may be said to pass

Estoppel.

Dier 58.
356.
Plow 421.
422. o. i.
155.

Dier 112.
Plow 432.

Co. 4. 59.

Co. 1. 155.
Plow 432.
434.
Hil. 6. Jac.
Adjudge.
Finch ver.
fus.
Vaughan

Dier 112.

Co. 1. 31.

by

by way of bargain and sale; this may help the matter, for in this case albeit it be by word onely, it may pass the reversion and the rent also: but in most cases it is good for the remainder of the term after the first lease ended. And if the second lease be to begin after the end of the former lease; in this case the former lease is no impediment at all to the validity of the latter lease, but the latter lease is good notwithstanding.

Any person whatsoever of full age that hath any estate of inheritance in fee taile in his own right of any lands, tenements, or hereditaments, may at this day without fine or recovery make leases of such lands for lives or years, and such leases shall be good so as these conditions and incidents following be therein observed and kept.

1. Such leases must be by deed indented, and not by deed poll or by paroll,

2. They must be made to begin from the day of the making thereof or from the making thereof. And therefore a lease made to begin from *Michaelmas* which shall be three years after, for twenty one years, or a lease made to begin after the death of the tenant in tail, for twenty one years is not good. But if a lease be made for twenty years to begin at *Michaelmas* next; it seems this is a good lease.

3. If there be an old lease in being of the land, the same must be surrendered, or expired and ended within a year of the time of the making of the new lease; and this surrender must be absolute and not conditional, also it must be real, and not illusory, or in shew onely. For *factum non dicitur quod non perseverat*.

4. There must not be a double or concurrent lease in being at one time, as if a lease for years be made according to the statute he in the reversion cannot afterwards expulse the lessee and make a lease for life or lives, or another lease for years according to the Statute, nor *e converso*. But if a lease for years be made to one, and afterwards a lease for life is made to another, and a letter of Atturney is made to give livery of seisin upon the lease for life, and before the livery made the first lease is surrendered; in this case the second lease is good.

5. These leases must not exceed three lives, or twenty one years from the time of the making of them. And therefore if tenant in tail make a lease for twenty two or for forty years or for four lives; this lease is void, and that not only for the overplus of time more then three lives or twenty one years, but for that time of three lives or twenty one years also. And it hath been resolved, that if tenant in tail make a lease for ninety nine years determinable upon three lives; that this is not a good lease. But if a lease be made by a tenant in tail for a lesser time, as for two lives, or for twenty years, this is a good lease. And if a lease be made for four lives, and

5. What Leases or other other acts may be made or done by a tenant in tail. And what leases made by such a tenant shall be good to bind the issue or him in remainder, or others after the death of the tenant in tail. And how they shall bind.

Stat. 32 H.
8. cap. 28.
Co. luter
lit. 44.

Co. 5, 6.
Dier. 246.

Co. 5, 2.

Co. 5, 2.

Sparkcase
Trin. 4.
Jac. B. R.

Co. 5, 6.
Dier. 246.

Co. 1.

it happen that one of the lives die before the tenant in tail die; yet this accident will not make the lease good, but it remains voidable notwithstanding.

6. These leases must be of lands, tenements or hereditaments manurable or corporal, which are necessary to be letten, and whereout a rent by law may be issuing and reserved. And therefore if a tenant in tail make a lease of such a thing as doth lie in grant, as an Advowson, Fair, Market, Franchise, or the like, out of which a rent cannot be reserved, especially if it be a lease for life; this lease is void, and that albeit the thing have been anciently and accustomedly letten. And a grant of a rent-charge therefore out of such lands is void. * And if tenant in tail make a lease for three lives of a portion of tithes rendring rent, this lease is unquestionably void. And so also it seems it is if it be a lease for twenty one years.

Co. 3. 2.

Tallen-
tines case,
Pas. h. 3.
Jac. B. R.
Co. 11. 60.
a Trin. 2.
Jac. B. R.
Adjudge
Doding-
tons case.
Co. 6. 37.
Dier 271.

7. They must be of such lands, or tenements, which have been most commonly letten to farm or occupied by the Farmers thereof by the space of twenty years next before the lease made, so as if it have been letten for eleven years at one or several times within twenty years before the new lease made, it is sufficient. And albeit the letting have been by copy of Court roll only, yet such a letting in fee for life, or years, is a sufficient letting, and so also is a letting at will by the Common law. But these lettings to farm must be made by such as are seised of an estate of inheritance; for if it have been only by Guardian in Chivalry, tenant by the curtesie, in dower or the like; this will not serve to be a letting within the intent of the statute.

8. There must be reserved upon such leases yearly during the same leases due and payable to the lessor and his heirs to whom the reversion shall appertain so much yearly farm or rent, or more as hath been most accustomedly yeilded or paid for the lands, &c. within twenty years next before such lease made. And therefore if the rent be reserved but for part of the time of the new lease, this lease is void. And if the tenant in tail have twenty acres of land that have been accustomedly letten, and he make a lease of these twenty acres, and of one acre more which hath not been accustomedly letten, reserving the usuall yearly rent, and so much more as to exceed the value of the other acre; this is not a good lease by the Statute. So if the tenant in tail of two Farms, the one at twenty pound rent, the other at ten pound rent, and he make a lease of both these farms together at thirty pound rent, this is not a good lease within the Statute. But if besides the annuall rent there have been formerly reserved things not annuall, as hariots, fines, or other profits upon the death of the Farmers, or profit out of anothers soil, as pasturage for a colt, &c. if upon the new lease the yearly rent be reserved, albeit these col-

Co. 5. 8. 6.
6. 37.

Co. 6. 37.

38.
Trin. 2.
Jac. B. R.
Adjudge.
Tr. 18.
Jac. 271.

laterall.

Co. 5. 6. laterall observations be omitted, yet these leases are good. And so also if there be more rent reserved upon the new lease then the rent that hath been anciently paid, the lease is good notwithstanding. And yet if tenant in tail of land let a part of it that hath been accustomedly letten, and reserve the rent *pro rata*, or more then after

Co. 5. 5. And yet Co. super Lites 44. b. is contra. the rate; this is not a good lease. And yet if two coparcenours have twenty acres of land of equal value between them in tail, and these have been usually letten, and they make partition of these lands, so as each of them hath ten acres; in this case they may make leases of their severall parts, reserving the halfe of the accustomed

Trin. 3. Jac. B. R. Cornwalls case: Co. 5. 5. rent. And if upon the old lease the rent were payable at foure dayes in the year, and by the new lease it is reserved to be paid at one day; this is not a good lease. But if the rent upon the old lease be payable in gold, and the new rent be payable in silver; it seems the lease is not good. And if a tenant in tail be of a Manor that hath been usually demised for ten pound rent, and after a tenancy escheat, and then he doth make a lease of th: Manor rendring ten pound rent by the year; in this case this is a good lease, but if the lessor purchase a tenancy, then it seems otherwise.

Co. 5. 6. 9. Such leases must not be without impeachment of waste. And therefore if tenant in tail make a lease of his land intailed without impeachment of waste; this lease is void. And if a lease be made for life, the remainder for life, &c. this is not a good lease, for in this case during the remainder, the tenant for life cannot be punished for waste done. But if such a tenant of land make a lease of it to 15 for the lives of three others; this is a good lease, albeit it may afterwards become an occupancy.

Co. 4. 37. & Meers case Adjudge.

Waste. 10. Such leases must not be against any speciall Act of Parliament. And therefore if a woman that is tenant in tail of the gift of her deceased husband, or any of his Ancestors whiles she is sole, or after with another husband, make any such lease warranted by this Statute; yet this lease is not good.

Stat. 11. H. 7. 30.

Co. 3. 51. 11. They must have all due ceremonies and circumstances for the perfection of them, as other such like leases have, as livery of seisin and the like, where they are needfull. And then onely when leases have these conditions, and are made according to these provisions, are they said to be within this statute of 32 H. 8. and such onely as do bind the tenant in tail himself, and the issue in tail, for otherwise if it be not warranted by this statute, albeit it will bind the tenant in tail himself that made it, yet it will not binde his issue, but as to him it will be void, or voidable at the least, for if tenant in tail of land make a lease of it for an hundred yeers, without any rent reserved thereupon, this lease as to the issue in tail, is void: but if he make a lease of his land for an hundred years

Co. 7. 7. 8. 54. Dier 7. 8. The woman's Law. yer. 73. Plow. 435.

Plow. 436.

receiving rent and have issue and die; in this case the lease is only voidable by the issue at his pleasure, and therefore if the issue accept the rent after the death of the tenant in tail; by this means the lease is affirmed and become good. But howsoever the lease be made, it will not bind him that comes in of a remainder over, nor him that is the donor. And therefore if a tenant in tail make a lease warranted by the statute, and after die without issue, so that the land doth remain over to another, or revert to the donor; in these cases neither he in the remainder, nor the donor shall be bound by this lease, for as to them the lease is void. And yet by a common recovery the tenant in tail may make leases of, or lay charges upon the land to bind the donor and him in remainder also. But otherwise it is a fine. For if tenant in tail make a lease for years by fine, this will not barre the donor, nor the remainder in any case where it is in a stranger. And yet if the remainder be in the tenant in tail himself, and he makes a lease for years by deed according to the Statute, or by fine, this lease is good, and shall bind his own remainder.

6. What leases
or other acts
may be made
or done by
the husband
with the lands
he hath in fee
simple, or fee
tail in the
right of his
wife, or
joynly with
her. And
what leases
made by him
of such lands
are good. Or
not. And
how.

The husband may at this day without fine or recovery, make leases of the land, tenements. or hereditaments, whereof he hath any estate of inheritance in Fee simple, or Fee tail in the right of his wife, or joyntly with his wife made before or after the coverture, so as there be in such leases observed the eleven conditions or limitations before required in the leases made by tenant in tail, and so that the wife do joyn in the same deed, and be made partie thereunto, and doe seale and deliver the same deed her self in person. For if a man and his wife make a letter of Atturney to another to deliver the lease upon the land, this lease is not a good lease from the wife warranted by the statute. And yet then, as in other like cases of leases not warranted by this statute, it is a good lease against the husband. And when the lease is such a lease as is warranted by the statute, it doth bind the husband and wife both, and the heirs of the wife: but if it be an estate tail, it doth not bind the donor nor him in remainder.

If the husband and wife at the common law had joyned in a lease of her land without rendring of rent; this lease had been void as against the wife, and so is the law still.

If the husband at the common law had been seised of land in the right of his wife, and he had made a lease for years rendering rent and died; this lease had been void, and so is the law still.

If the husband and wife at the Common Law had made a lease by word rendring rent; this lease had been void as against the wife, and so is the law still.

Stat. 31. H.
§. cap. 18.
Co. super.
Lit. 44.

Pafch 7.
Jac.B.R.

36 H.8.2.

26 H. 82.
Co. 277.

Dicr. 91.

The

Stat. 32. H.
9 ch. 28.
See the
womans
Lawyer
163.

The husband and wife together may by fine, or recovery, make what leases they will of her land, or charge it for what time they will; and such leases and charges will be good against the husband and wife both, and their heirs also. But if the husband alone doe levie any fine of his wifes land, and thereby make any estate whatsoever; this will not bind the wife after the husbands death, but she may avoid it. And if the husband and wife make a lease of her land rendring rent to them and the heirs of the wife (as in such leases it ought to be;) in this case the husband cannot by fine or otherwise grant or discharge this rent longer then during coverture, unless the wife joyn in the fine, but the rent shall descend, remain or revert in such sort and manner as the land should have done.

Co. super
Lit. 44.
Co. 5. 14.
11. 66.

Bishops with the Confirmation of the Dean and Chapter, Parsons or Vicars with the consent of their Patrons and Ordinaries, Archdeacons, Prebends, and such as are in the nature of Prebends, as Precentors, Chaunters, Treasurers, Chancellors, and such like, also Masters and Governors, and Fellows of any Colledges, or Houses (by what name soever called) Deans and Chapters, Masters or Guardians of any Hospitall, and their brethren, or any other body Politique, spirituall and ecclesiasticall (*Concurrentibus his que in jure requiruntur*) might by the ancient Common Law have made leases for lives or years, or any other estates of their spirituall or ecclesiasticall living for any time without stint or limitation. And at this day the Bishops, and the rest of the said Spirituall persons, except Parsons and Vicars, may make leases of their spirituall livings for three lives or twenty one years, and such leases will be good both against themselves and their successors. But such persons may not make leases or estates for any longer time then for three lives or twenty one years, and if they do, albeit it be by fine or recovery or it be confirmed by the Dean and Chapter, &c. yet it is void against the successor. Neither will the leases made by such persons for three lives or twenty one years be good, unless they have certain conditions and properties required in them. These things therefore are necessarily required to be observed in the making of such leases: 1. That they have the effect of all the qualities or properties before mentioned and required by the statute of 32. H. 8.

Stat. 32. H.
8. ch. 28.
23. El. ch.
10. 1 Jac.
chap. 2.
1 El. ch.
23. 14. El.
ch. 11.
1 El. ch.
10. 20.

in the lease made by the tenant in tail, and be made after that pattern, viz. That they be by deed indented. 2. That they do begin from the time of the making of them. 3 and 4. That the old lease be surrendered, and there be not a concurrent lease (save in case of a Bishop) And therefore if any such person make a lease for 21 years to one, & then make a lease for three lives to another; this second lease is void. And yet if a Bishop make a lease for 21 years to one man, & then within a year after make another lease to another for

7. What leases or other acts Bishops or other spirituall or ecclesiasticall persons may make or doe with the lands they have in the right of their churches or houses. And what leases made by such persons, will bind their successors and others, Or not.

Co. super
Lit. 44.
Co. 11. 66.
53. 15.

21 years to begin from the making of it, this so as it be confirmed by Dean and Chapter, is resolved to be a good lease. 5 That they do not exceed three lives or twenty one years; but they may be for a lesse time. 6. That they be of lands or tenements manurable or corporal. 7. That they be made of lands that have been commonly let to farm by the space of 20 years before. 8. That there be reserved upon them the ancient and accustomed rent payable to the lessor and his successors during the time 9. That they be not made without impeachment of waste. 10. That there be livery of seisin upon them, &c. Where it is requisite. 11. If the lease be made according to the exception of the Statute of 1 Eliz. and 13 Eliz. and not warranted by the statute of 32 H. 8. as in the case of a concurrent lease, and it be made by a bishop or any sole Corporation, it must be confirmed by the Deans and Chapters, or others that have interest. And if a Parson or Vicar make a lease, it is not good but during the Parson or Vicars residence, according to the statute of 13 Eliz. chap. 20. and in this case there needs no confirmation at all. 12. Some of the leases that are made by the Colledges and Houses of the University, &c. must have some rent corn reserved upon them. But Bishops, Deans, Parsons, and such like spirituall persons cannot grant the next advowsons of Churches, neither can they grant rents out of their spirituall livings, but the same charges will be void after their death. And if a Bishop suffer an annuity to be recovered against him by a pretence of title of prescription on a Judgment after a verdict or confession, or a Parson in such a case pray in aid of the Patron, and so suffer an annuity to be recovered this will not bind the successor. And yet a Bishop or any such spirituall person may grant ancient offices of trust of necessity or convenience, as the offices of Chancellor, Register, Steward, Bailiffe, or the like, with the ancient Fees incident thereunto for the life or lives of the grantees, and such grants are good, albeit they be made by the Bishops of the new erected Bishopricks, and that there be not in them the conditions and properties required in the leases before mentioned, so as they be confirmed by the Dean and Chapter. But they may not grant any new office, nor yet adde any new Fee to the old offices, And therefore if a Bishop grant any annuity *pro consilio impenso & impendendo* where none was before, this will not bind the successor. And yet if there be an old fee, and there is a new fee added to it, in this case it seems it is good for the old fee, albeit it be void for the new fee. Neither may they grant their offices otherwise then they have been granted. And therefore where the ancient grants of the office have been to one, it cannot be now granted to two. And where the ancient grants have been to two joynly, they may not be now granted in remainder one after another. Neither may the grants of these offices be longer then for the

Co. 11. 66.
5. 2.

Stat. 18.
El cap. 20
Co. 5. 15
11. 66. 10.
58.
Dier. 370.
And most
of these
points
were a-
greed by
Justice
Jones and
Just. Whit-
lock at
Lent Ass-
ises at Glo-
cest. 6.
Car.

the life or lives of the grantees. And in case where the grant is void, the confirmation of the Deane and Chapter will not make it good.

But here note that albeit in all these cases of leases and grants not warranted by the Statutes aforesaid, the Statutes say the leases shall be void; yet this is to be understood as against the successors and not against the lessors themselves, for the leases are good so long as the lessors live, or at least so long as they continue in the place. And therefore if such a lease be made by a Deane and Chapter or other Corporation aggregate; it is good as against the Deane or other head of the Corporation, so long as he doth continue in his place. And if a Bishop make any lease or other grant not warranted by the Statute of 1 *Eliz.* or a Deane and Chapter, Master and Fellows of a Colledge or the like make leases not warranted by the Statute of 13 *Eliz. cap. 10.* these leases are good against themselves albeit they are void against their successors. So as if a private A^ct of Parliament doth entaile land upon a man, and appoint him what estates he shall make, and that if he make any other estates they shall be void; in this case they shall not be void as to the tenant in tail himself that doth make them.

Note:

Stat. 13. F.
cap. 20.

Leases of Benefices with cure are no longer good then the Parson is resident

Leases made by Colledges must have reserved upon them the third part of the rent in Corn. See the Statute of 18 *Eliz. cap. 20.*

Co. super
Lit. 55, 56,
270. 14 H.
8. 12.

If one make a lease to another during the will and pleasure of him that letteth, or him that taketh, or both (for so in effect is every lease at will;) this is a good lease at will. So if one make a feoffment in fee, or lease for life, &c. and doe not make livery of seisin and so perfect the estate, the feoffee or lessee hath only an estate at will. But if a bargain and sale be made of land, and the same is void, or a Corporation grant land, and the grant is void, by this there is no lease at will made.

8. What shall
be said a good
leave at will.
Or not,

Co. Super
Lit. 45. 3.
50.65-7,8.

Leases for lives or yeares are of three natures, some be good in law, some be voidable by entry, and some void without entry. And of such as be good in law some be good at the common law, and some be good by act of Parliament. as leases made by tenant in taile, leases made by a Bishop seised in fee in the right of his Church alone without the Chapter, leases made by a man seised in fee simple or fee taile of land, in the right of his wife together with his wife. for twenty one yeares, or three lives according to the Statutes. And of such leases as be void also, some are void at the common law, and that sometimes *in presenti*, as in the cases before of leases for yeares that have no certainty in them, or leases for lives made without livery of

9. Where a lease for life or years shall be void *ipso facto* by the death of the lessor or by other means. Or not, but voidable by entry &c. And how.

Acceptance.

Acceptance.

feisin, and the like. And some are void in *future*, as if a tenant in tail make a lease for years warranted or not warranted by the Statute, and after die without issue; this lease is void as to him in reversion or remainder: *Cessante statum primitivo cessat derivativum*. So if a Prebend, Parson, or Vicar make a lease for years not warranted by the Statutes; this is void by the death of the lessor, and the successor need not make any entry or claim to avoid it. So if a tenant for life make a lease for years and after die; in this case the lease for years is void. And therefore in all these and such like cases no acceptance of rent after will affirm such leases. But otherwise it is in cases of leases for years made by Bishops albeit they be confirmed by Deane and Chapter; and of leases made by Deans and Chapters, or tenant in taile, as to their successors and issues, when the leases are not warranted by the Statutes: And otherwise it is also in the case of leases for life made by these or any of the former lessors, for in all cases of leases for life it must be avoided by entry, &c. and therefore such leases are not void but voidable. *viz.* The leases of Bishops and Deanes after their death by their successors and that by the Statute law, and the leases of tenants in taile by their issues after their death, and that by the common law. And in these and such like cases the acceptance of the rent by the issue or successor will make good the lease at least for their time.

If a lease be made for years on condition that upon such a con- Co. 3. 65.
tingent it shall be void; in this case so soone as the thing doth hap-
pen the lease is void *ipso facto* without any reentry &c. But if a lease
for life be made on such a condition; in this case the lessor must
enter &c. before the lease will be void.

CHAP. XV.

Of a Feoffment, Gift, Grant, and Lease.

1. Where and
by what
means a feoff-
ment, gift,
grant, or lease
and the estate
thereby made
being good at
first becometh
void by matter
ex post facto,
and may be
avoided. Or
not, and how.

A Feoffment, Grant or Lease in writing may become void by
Rasure, interlining, and the like, as hath been shewed before in
Deed, *supra*. And a feoffment, grant, or lease, and the estate there-
by made may become void by forfeiture, or upon a breach of a con-
dition, or by a limitation. For which See *Condition* and *Use*. Also
they may become void by disagreement or refusal: And this may
be either by the disagreement of the party himselfe to whom it is
made, or by the disagreement of another: Of the party himselfe
for no estate can be made to a man of any thing in fee simple, for
life,

Co. 3. 26.
27. 5. 119.
Doct. &
Stud. 119.
Perk. Sed.
44. 45. Fitz
Dome 4. 5.
Bro. Dome
29. 30. 50.

life, or otherwise against his will: and therefore by his disagreement or refusal of it, the estate it self, and the deed whereby it is conveyed may become void. By the disagreement of another, as the husband in case of a Feoffment, &c. made to his wife may by disagreement avoid it. And for the first of these the law is thus. That all such acts that give estates directly or by way of use are good at first, and the things granted when the deed of the grant is delivered to his use shall vest in the grantee before he hath notice of the grant or agree to accept of the thing granted, so that if lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or lease, or goods or chattels be given or granted to a man; in these cases the things granted shall be said to be in the grantee and the grant good before notice and agreement untill disagreement. And before agreement the grantee may waive it, and so avoid the estate and the deed also, whereby the estate is made. And if it be but a lease for years that is made; he may waive and avoid that by word of mouth in the country as well as a gift of goods, or an obligation delivered to his use. But if it be an estate of Freehold that is made by Feoffment, &c. it seems he cannot waive and avoid that but in a Court of Record.

When the cause of a grant faileth and the thing granted is executory, the grant is become void. As if one grant an annuity for an acre of land, for tithes, or for counsell; in this case *pro* is conditional, and therefore if the land be evicted by an elder title, or the grantee disturbed in the tithes, or he refuse to give counsell, the annuity is determined. But if a Feoffment, or lease for life or years be made of an acre of land *pro una acra*, &c. as in the case before; albeit the acre be evicted, &c. yet the grant in this case of the acre of land is good. As if one grant an annuity for counsell, if the grantee will not give counsell, the grant is not of force. So if one grant to make new pales in a place for the old pales; if in this case he cannot have the old pales it seems the grant shall not bind him to make new pales. So if one grant a rent for a way; stop the way, and the rent shall be stopped.

If one that hath a lease for life or years, of a manor, to which an advowson is appendant, grant the next avoidance that shall happen during the lease, or grant a rent out of the manor, and then surrender the manor, so that his estate is gone, in this case notwithstanding the grant of the next avoidance, and of the rent doth continue good, and the grantee shall enjoy it according to the grant, as long as the estate that is surrendered should have had continuance.

If the heir of the Kings tenant enter and make a lease before livery sued, and after an intrusion is found against him; by this it seems the lease is avoided. So if tenant in tail make a lease warranted by the Statute, and after dieth without issue; by this the lease is determined.

If.

Co Supper
Lit. 204.
Plow. 134.
35 B. 4. 4.
Dier 76.
p E. 4. 20.

Co. 8. 144.
145.

H. 7.

If a tenant in tail make a Feoffment to his heir within age, and he, after he is of full age, make a lease for years of the land, and after the tenant in tail dieth, and the heir is remitted: the lease in this case is not avoided.

Co. Super
Lit. 149.

If an annuity be granted to one until he be advanced to a benefice by the grantor, and the grantor die, and the heir or executor of the grantor tender a benefice; it seems this will not determine the grant.

Plow. 101.
15 H. 7. 1.

If *A* be lessee for years of an advowson, and grant the next avoidance to *B*, if it shall happen to become void during the term, and *A* doth surrender the term to *C*, who hath the inheritance, and the Church become void before the end of the term; in this case the grant is good to *B*, and he shall have the next avoidance, for a man cannot derogate from his own grant. So if *A* be lessee for years, and he grant a rent charge to a stranger, and after surrender his term to the lessor, in this case albeit the term be extinct, yet the rent doth continue, and the stranger shall have it during the term. So if *A* have a rent charge out of the land of *B*, and acknowledge a Statute to *C*, and then release the rent to *B*; in this case albeit the rent be gone as to *A* and *B*, yet it is in *ess* as to the donee, and he may extend it.

Co. 8. 145.
7. 39.

If a man be seised of a great wood, and grant to *IS* six hundred coards of wood out of the same wood, to be taken by the assignement of *A*; in this case if *A* will not upon request assigne where the wood shall be taken, yet the deed will not lose his effect, but *IS* may take it without assignement.

Co. 5. 24.

If *A* be lessee for life on condition to have Fee, and he make a lease to *B* for years, and after he perform the condition, and so his estate for life is turned into a fee simple; in this case the lease for years is good still notwithstanding: but otherwise it is in case of the King.

Co. 7. 14.

If *A* tenant in tail enfeoff *B* on condition to the use of *A* in Fee, and *A* had granted a rent charge or acknowledged a Statute which by the Statute of 1 R. 3. cap. 5. was extended, and after *A* had performed the condition; in this case albeit the estate had been changed, yet the interest of the grantee or donee had continued.

Co. 1. 149.
148.
11 H. 7. 21.

If *A* be tenant for life, the remainder to *B* in tail, the remainder to *A* in Fee, and *A* doth grant a rent charge, or acknowledge a Statute and die; in this case, and hereby the grant is not become void. But if *B* die without issue, the heir of *A* shall be charged.

5 E. 4. 2.
Perthouffe
& Chances
case.
Nic. 96.
27. El. Co.
B.

If a corody be granted for a service to be done, the omission of the service doth determine the corody.

Paris
Rep. 1.
20 H. 4. 4.
Dow. 11.
220.

If one grant lands with his daughter in frank marriage, or goods with his daughter in marriage, and after the marriage is dissolved and they

they are divorced; in this case the grant is now become of no force
Cessante causa cessat effectus.

Bro. Grant
203.

If one man grant to another an office of charge onely to which there is no benefit or Fee incident, in this case he may avoid and determine his own grant at his pleasure without any cause given. But if there be any Fee or profit incident to the office, then he may not avoid the grant of it, or put out the officer without some cause of forfeiture: and if he doe, the grantee may have an assise. And yet in this case also he may put him out of the office, albeit he may not deprive him of the fee or profit incident thereunto.

2. Where a man may avoid his own Grant, Or not. And when.

Bro. Grant

If one grant a Ward to another to marry, or for his service; it seems he may not afterwards avoid this grant. But if one grant him to another for instruction or education, *contra*.

Bro. Grant
118.

If one make a lease for years of his land rendring rent, and after grant the rent to / S, and the termor atturn, & after the lessor accept of a surrender of the estate of the termor; yet this doth not avoid the grant of the rent, but the same shall continue still.

Lit. Sect.
177.

If a disseisor grant a rent, common, or other profit apprender out of the land, and after the disseisee doth enter and enfeoffe him of the land; in this case the rent is avoided, and the common is gone. But if the disseisee release the disseisor, in this case he shall not avoid his own grant.

An infant, and other disabled, may impeach and avoid their own grants in divers cases, which see before in *Grant*.

A deed of Feoffment, &c. in some cases is holpen, and a fault therein cured by making of livery of seisin. For which see *Feoffment* and *Lease*. But an attornment will not help the grant of a reversion, &c. for it is a maxime in law, That attornment cannot make a void grant good.

3. Where and by what means a feoffment, gift, grant, or lease, or the estate thereby made, being void, or voidable at the first, may become good by matter ex post facto. Or not.

Co. 1. Ca-
pels case.
Dier. 373.
Mo. 1. 48.
76.

If a tenant in tail make a lease for life or years of land, and this lease is voidable, and after the tenant in tail doth suffer a common recovery of the land to whomsoever it be; by this the lease is affirmed and made good during the term as well against the issues and heirs by the entaile, as against him in reversion or remainder. And so it is of a charge of rent upon the land. And if tenant in taile make a lease of the land, or charge it, and after levy a fine of the land to a stranger, by this the lease or charge is become good against the issue in tail also.

30. held in
the Exch.
quer. Hil.
26. Jac.

If a tenant in tail make a lease for forty years, rendring rent, and die, and his issue doth lease to another by Indenture for twenty one years rendring rent, to begin after the expiration, forfeiture or surrender of the first lease; it is said this doth confirm the first lease: *Sed quare.*

Acceptance of rent reserved on a lease for life or years, which is voidable only and not void, may make the lease good.

A Feoffment, Gift, &c. that is made by Dureffe or Manasse, and therefore voidable, may by another deed of defeasance afterwards made between the same parties, become good.

Bro. De.
feasance,
17.

Also grants, leases, and the estates thereby made that are not good, may be made good and perfected by release or confirmation, For which see *Release* and *Confirmation*.

4. Where and when a Feoffment, gift, grant, or lease, may be good for one time, and void for another; and good against one person but void against another; and good in part, and void in part. Or not.

A Feoffment may be good against some persons, and void against others, but cannot cease and revive, and be good and void at several times, as a lease for years, or a grant of rent, &c. may in many cases, for a grant may be suspended, and a lease for years may cease and revive again, as if tenant in tail make a lease for yeares rendering twenty shillings rent, and after taketh a wife and dieth without issue, and he in reversion or remainder endoweth his wife (as he may,) in this case the lease as against the woman is revived, albeit it be void as to him in reversion or remainder. So if tenant in tail make a lease for years, and die without issue, his wife ensent with a son, and he in reversion enter, and after the son (being heir to the entail) is born; in this case the lease which was before avoided by him in reversion, if it be such a lease as is warranted by the Statute, is good against the issue in tail, and therefore is revived again. So if the King make a gift in tail to *W*, to hold by Knights service, and *W* doth make a lease to *A* for thirty yeares reserving rent, and then *W* dieth, his son and heir of full age; in this case as to the King, this lease is void, but after livery sued out the lessee may enter again, and if the issue accept the rent, the lease is affirmed. So if tenant in tail make a lease not warranted by the Statute, and die, and his heir is in ward; in this case the Gardian in the behalf of the heir, may avoid the lease during the wardship, but afterwards the heir may affirm it again if he accept of the rent. So if tenant in fee simple take a wife, and then make a lease for years and dieth, and the wife is endowed, she shall avoid the lease for her estate, but after her death the lease will be in force again. But if the Patron grant the next avoidance, and after the Parson, Patron and Ordinary before the Statutes had made a lease of the glebe for years, and after the Parson had died, and the grantee of the next avoidance had presented a Clerk to the Church who had been admitted, instituted and inducted, and had died within the terme, and the Patron had presented a new Clerk to the Church, who had been admitted, instituted and inducted; in this case the lease had not revived again. No more then if a Feme covert levie a fine alone, and the husband doth enter and avoid the fine, the estate shall revive against the wife after his death, for it is avoided as to her also as well as to the husband by his entry. See more in *Deed* *supra* cap 4. Numb. 71.

Co. super
Lit. 46.
7.8.

Where a Feoffment, Gift, Grant, or Lease, is voidable, in some cases

Co. Super
Lit. 45.
Co. 7, 8.
Dier 337.
339.

cases it may be avoided by the party himselfe that made it, and not by others albeit they be privies, as heirs, executors, or administrators, and in some cases it is voidable by others, and not by the party himself, and in some cases it is voidable by the party himself and by others. And in some cases it is avoidable onely at some times, and in some cases it is avoidable at all times: as for examples, an Infant if he grant by fine must avoid it during his minority if he live to be of full age, otherwise he himself or any other shall never avoid it. But if he grant by deed, this may be avoided at any time by himself, his heirs, executors, or administrators, or his Gardian in his right as the case is. But a Lord by escheat cannot avoid a voidable estate made by his tenant being an Infant. And if a woman covert doe any such act by deed; it may be avoided by her husband during the coverture, or her self after the coverture, or her heirs, &c. that are privies after her death. And if a man *de non sane memorie* doe any such act, it may not be avoided by himself that is the party denying it, but it may be avoided by his heirs, &c. that are privies. And if tenant in tail make a voidable lease not warranted by the Statute, he may not avoid it himself, but his issue may. And if he be in ward by reason of a tenure in capite or Knightservice, the Gardian of the issue during his time may avoid it. And if a Corporation spiritual, sole or aggregate, make leases not warranted by the Statutes, they may not avoid it themselves, but their successors after their death, translation, or other remotion, may avoid it; or if a Bishop make such a voidable lease, the King when the Bishoprick doth come into his hands, may avoid it.

Who may
avoid a Feoff-
ment, Gift,
Grant or
Lease, that is
voidable. Or
not. And
how.
Infant.

Woman co-
vert.

*De non sane
memorie.*

Tenant in tail

Corporations.

And now we pass to another sort of Assurances that are for some special purposes, and in some special cases only wherein we shall first begin with an *Exchange*.

CHAP. XVI.

Of an Exchange.

AN Exchange is the mutual grant of equal interests the one in exchange for the other. Or it is, where a man is seised or possessed of land in Fee-simple, Fee tail, for life, or years, or is possessed of goods, and another is seised or possessed of other lands, or possessed of other goods in the like manner, and they do exchange their lands or goods the one for the other, and in this there is a double grant, for each of them doth grant that which is his to the other.

1. Exchange,
or Eschange.
Quid.

This manner of conveyance (which heretofore was very frequent) is sometimes made by word without any writing: and sometimes it is made by deed or in writing: and which way soever it be made it must be made by this word *Exchange*, which is a word so appropriated

Terms of
the Law,
tit. Ex-
change.
Fitchelley,
37.

Co. Super
Lit. 501.
Perk. Sec.
293.

priated to this thing as the word Frankmarriage is to a gift in Frankmarriage, neither of which can be made or described by any circumlocution.

a. The effect
and fruit of it.

The fruit and effect of an exchange is, that it doth give the interest, and after the property of the things exchanged to either party according to the agreement. And if the exchange be of lands or tenements of any estate of inheritance or freehold, whether it be by word or deed, it hath a condition and a warranty in law incident and annexed to it as a thing made by the word Exchange and *tacite* implied in every grant of exchange: A condition to give a re-entry upon all the land given in exchange, if he be put out of all or part of the land taken in exchange, and a warranty, to enable him to vouch and to recover over in value so much of his own land again given in exchange as shall be recovered from him of the land taken in exchange, if he be sued for it: so that upon every exchange either party if he be put out of or lose by action the land he taketh in exchange, hath a double remedy against the other, and yet this remedy doth goe only in the privity, and shall not goe to an assignee: As if

Co. 4. 129.
15 E. 4. 2.
9 E. 4. 21.
Bro. Et.
change in
toto. Fitt.
Et. change
in toto.

Condition.

Warranty.

Assignee.

A exchange land with *B*, and *B* be put out of all or part of the land upon a title paramount by a recovery in a real action or otherwise, in this case *B* may either enter upon his own land again which he gave in exchange, or else if it be in an action brought he may vouch *A* upon the warranty in law, and shall recover as much in value against him of the land he gave, as he hath lost of the land he took in exchange. But if *B* alien his land taken in exchange to *C*, and *C* be put out of all or part of the land upon a title paramount, *C* in this case can neither enter upon the land given to *A* in exchange upon the condition in law, nor vouch *A* to warranty and recover over in value upon the warranty in law. And yet *A* in this case shall have the like remedy against *C*, the alienee upon the condition and warranty both as he had against *B*. But if *A* himself implead *C* for the land he gave to *B* in exchange, *C* may make use of this warranty in law by way of Rebutter against *A*. And in all these cases where one of the parties is put out of all or part of the land, or out of part of the estate by entry, and the other party enter upon the others land upon the condition in law, he may enter upon the whole land and avoid the whole exchange: but if he be impleaded for a part onely, or for the whole, and a part onely be recovered from him in this case he shall recover so much in value of the other land only as he hath lost, and no more. As if an exchange be of three acres for three acres, and after one of the parties is put out of one of the acres by the entry of a stranger: in this case he may enter upon the whole three acres he had given in exchange, and so avoid the whole exchange if he will. And if *A* and *B* be jointenants for life, and the Fee simple to the heirs of *A*, and *A* exchange this land with *C* in Fee, and then die, and *B* enter and

avoid.

Rebutter.

avoid the exchange for his life (as he may) in this case *G* may avoid the whole exchange, and enter upon his own three acres again. So if he in reversion disseise his tenant for life, and then exchange the land, and after the tenant for life enter; in this case the other party may defeat the whole exchange. But in this case of an exchange of three acres for three acres, if one of the acres were gained by disseisin, and the disseisee bring an action and doth recover it against the disseisor, in this case if he vouch over the other party to the exchange, he shall recover so much in value only of the three acres he gave in exchange, as the acre he hath lost and no more.

See Grant
Numb. 4.

To the perfection of an Exchange, and to make things to pass by this kind of conveyance, these things are requisite. 1. That the persons or parties thereunto be able to give and take, and not disabled by any special impediment. And for this it must be known that such persons as may be grantors and grantees may make exchanges, and such persons as are disabled to grant, are disabled to make exchanges.

3. How an exchange must be made. And what shall be said a good exchange. Or not.

1. In respect of the parties thereunto, and their estates. 1 Infant.

Co. Super
Lit. 51.

An exchange made between the King and a subject is good, albeit the King hold his land in one capacity, and the subject in another.

Idem.

An exchange made between an Infant and another; is not void but voidable onely, for the Infant at his full age may affirm or avoid it at his election.

Tenant in tail

Bro. Es-
change. 9.
Perk. Sect.
279.
Bro. Es-
change. 9.

An exchange made between a tenant in tail and another, is not void but voidable, for it is good against himself during his life, and his issue at his full age may affirm or avoid it at his election.

An exchange made between a man *de non sane memoria*, and another is not void but voidable for it is good against him, but his heir may avoid or affirm it at his election.

De non sane memoria.

Bro. Idem.
Perk. Sect.
279.

A man that doth hold land in Fee simple, Fee tail, or for life, in the right of his wife, may exchange this land, and the exchange will be good as long as he and his wife doe live. And he with his wife may exchange it for longer time and the exchange is good against him, but his wife after his death may affirme or avoid it if she will.

Husband in right of his wife.

Perk. Sect.
281.

One Parson or Vicar may exchange his Church or Benefice with another, and this exchange is good.

Parson.

Perk. Sect.
280, 273.

The disseisor and disseisee may joyn together, and exchange the land whereof the disseisin was made with a stranger for other land; but if it be made out of the land and before the entry of the disseisee, it shall not bind the disseisee, for he may avoid it. And a disseisor cannot exchange the land he hath gotten by disseisin with the disseisee for other land, for this exchange is void, unless it be by indenture, or fine, that it may work by way of estoppel.

Perk. Sect.
279.

The lessor and lessee may joyn together and exchange the land leased for other land, and this is good: for it shall be said to be the surrender of the lessee to the lessor, and the exchange of the lessor; and therefore the lessee (as it seems) shall have nothing to do with

Surrender.

Jointenants.
Tenants in
common.

with the land taken in exchange. *Sed quere* of that.

Jointenants for life, the fee to one of them may exchange their land with a stranger for other land to hold in the same nature, and the exchange is good. But Jointenants, tenants in common, and coparceners cannot exchange the lands they do so hold one with another before they have made partition

Perk. Sect.
277. 281.

If *A* and *B* be Jointenants for life, the fee to *A*, and *A* exchange the whole land with another for other land, this is good only for his moiety as some have said. But it seems notwithstanding it is good for the whole until it be avoided by the other Jointenant.

Perk. Sect.
277.

2. In respect
of the matter
whereof it is
made, or the
nature of the
thing exchan-
ged. And of
what things
and estates an
exchange
may be made.

The second thing required in a good exchange is, that the things exchanged be such as whereof an exchange may be made. And for this it must be known that an exchange may be made of things of the same nature, as of a temporal thing for a temporal thing, a spiritual thing for a spiritual, as a house for a house, land for land, a Manor for a Manor, a Church for a Church, rent for rent, common for common, a horse for a horse, one peece of plate for another, or the like: or it may be made of things of a divers nature, as of a temporal thing for a spiritual, as of a house for land or rent, a chamber in a house for common or for a reversion, seigniory or advowson; of land or rent for a right of land or release of right, of an advowson for land, of a rent for a way, of a horse for a peece of plate, of a gowne for a house, or the like. And exchanges made of these things albeit the things exchanged doe lie in divers counties are good. Also a seigniory by homage and fealty or the like which is not valuable may be exchanged for land, rent, or any other such like thing. So may a seigniory by divine service. But a seigniory in frankalmoine cannot be exchanged with any but the tenant of the land that doth hold by the tenure. And houses, manors, lands, rents, commons, seigniories, reversions, and the like may be exchanged in fee-simple, fee-tail, for life, or years. So that an exchange may be of an Inheritance for an Inheritance, of a franktenement for a franktenement, and of chattels real for chattels real.

Perk. Sect.
261. 261.
262. 266.
258.
Lit. Sect.
62. Co.
Super Lit.
54. 52.

If one grant white acre in exchange for black acre lying within the same or in two counties, this is a good exchange. So if I grant a rent-charge issuing out of my land in exchange to *I S* for an acre of his land, &c. this is a good exchange. So if I have a rent issuing out of the land of *I S* and I grant this to *I K* in exchange for land or other rent; this exchange is good when the tenant hath returned to the grant of the rent. So if one have a rent out of my land in fee, and I have the land in fee, and I grant the land in exchange for the rent, it seems this is a good exchange. But if one grant me a Manor or land, and I in exchange for the same Manor or land grant unto him a rent *de novo* issuing out of the same land or Manor, this cannot take effect as an Exchange. So if one release his Estovers that he hath in such a Wood, and deliver the Release in Exchange for land given

Perk. Sect.
259. 260.
258.

Perk. Sect.
244.
Idem 287.
3 E. 4. 10.
9 E. 4. 21.
9 E. 4. 11.
Perk. Sect.
262.

Perk. Sect.
266. Fitz.
Exchanges
16.

to him in exchange for the same release; this is a good exchange.

Perk. Sec. 271. If there be a disseisor and disseisee, and the disseisee release his right to the disseisor in exchange for other land; this is a good exchange.

Idem. 282. So if the disseisor of an acre of land enfeoff a stranger of the same acre of land, and the Feoffee give to the disseisee an acre of land in fee in exchange for a release of all his right in the acre of land of which he was disseised; this is a good exchange. But if the disseisee grant his right to a stranger that hath nothing in the land in exchange for an acre of land; this exchange is not good, neither shall the stranger take any thing by this grant. If there be Lord and tenant by fealty and 12 d. rent, and the Lord exchange the seigniority with the tenant for the tenancy, or a *converse*, by deed indented; this is held by some to be a good exchange. If I have a rent issuing out of the land of *IS*, and I grant or release the same land to *IS* in exchange for other land; this is a good exchange. So if I release the same rent unto him in exchange for a way over his ground; this is a good exchange. If I be seised of lands to which *IS* hath a right of action, & I give to him other land for a release of his right; this is a good exchange. And the same law is of an exchange of land, and an advowson by deed indented, for a release of right in another advowson, to an usurper, when his incumbent hath bin in possession of the Church six months. If two Parsons of a Church make an exchange of their Benefices by words of exchange, and each of them resigne his Benefice into the hands of the Bishop to the same intent, and the Patrons present accordingly, and the presentations are *per viam permutationis*; this is a good exchange. If three acres of land with an advowson appendant be given in exchange by *TK* to *IS* for a chamber to be assigned by the said *IS* at the election of *TK*, and he assigne two chambers, and *TK* choose and enter upon one, and *IS* enter upon the land; this exchange is good notwithstanding the incertainty. So if *IS* give his manor of *A* to *TK* in exchange for his manor of *B*, or for his manor of *C*, and he enter upon one of these manors, and *TK* enter upon the manor of *A*: this exchange is good.

Co. Super Lit. 50. Perk. sec. 265. Out of all which these things by the way may be observed. 1. That the things exchanged need not to be in *esse* at the time of exchange made, for a man may grant a rent *de novo* out of his land in exchange for a manor. And yet if I grant to another the manor of *A* for the manor of *B*, which he is to have after his fathers death by descent, it seems this exchange is void. 2. There needs no transmutation of possession, for a release of rent, estovers, or right of land, for land is good. 3. The things exchanged need not to be of one nature, so as they concern lands or tenements, for land may be exchanged for rent, common, or any other inheritance which doth concern lands or tenements, or spiritual for temporal things, as

ties, a tenure by divine service for land or a temporal feigatory. But annuities and such like things which charge the person only and do not concern lands or tenements, or goods and chattels, cannot be exchanged for land.

3. In respect of the manner of the making of the exchange. And where it shall be good without deed or not.

The third thing required in a good exchange, that it be made in that manner and order that law doth require : wherein these things are to be known. 1. That if all or part of the things whereof the exchange is made do lie in several counties : or if all or part of the things whereof the exchange is, be such as lie in grant and not in livery, albeit it be in the same county : in these cases the exchange must be made by deed indented in writing. But where the exchange is of lands, and of lands lying in the same county, albeit it be of any estate of inheritance or free hold, yet it may be by word of mouth without writing. And so also may it be when the things exchanged do lie in divers counties, when the exchange is made onely for a term of years. And therefore if an exchange be made between *I S* and *T K* of lands lying in one and the same county in Fee, or for life, it may be by word of mouth : but if all or part of the lands of *I S* lie in one county, and all or part of the lands of *T K* do lie in another county, this exchange must be made by deed indented. If an exchange be made of rent for land, and the land out of which the rent is issuing, and the land given in exchange for it, doth both lie in one county ; this exchange cannot be good without deed. So if an exchange be made of the reversion of an acre of land for three shillings of rent issuing out of another acre of land, and both acres are in one county ; this exchange must be made by deed indented, or it will not be good. So if an exchange be made of an acre of land, and a rent out of another acre for another acre of land and common for three beasts, and all is in one and the same county, this exchange must be by deed indented, or it will not be good : But if I be seised of a manor to which I have common appendant or appurtenant, and *T K* is seised of another manor to which he hath a villain regardant, and both the manors are in one county, an exchange may be made of these manors by word of mouth without writing, and the common and villain will passe as incidents well enough. And yet if *I S* hath an office whereunto land doth belong, and *T K* hath rent issuing out of the land of a stranger, and all the land is in one county, and the office is to be used and occupied in the same county ; if these things be exchanged it must be by deed indented. 2. The word [Exchange] or [Exchange]

must be had and used between the parties in the making of the exchange. As I grant to white acre To have and to hold to you and your heirs in exchange for black acre. And in consideration hereof you grant to me and my heirs black acre in exchange for

white.

Perk. Secd.
244.
Co. Super
Lit. 51. 52.
Lit. 52. 53.
Co. 9. 14.
Perk. Secd.
247, 248.
249, 250.
146.

Co. Super
Lit. 50. 51.
Perk. Secd.
252, 253.
9 E. 4. 21.
Fitz. Ex-
change 12.

white acre ; for this word is so individually requisite, as it cannot be supplied by any other word, neither will any averment that it was in exchange, help in this case. And therefore if *A* by deed indentured give to *B* an acre of land in Fee simple, or for life, and by the same deed *B* doth give to *A* another acre of land in the same manner, this cannot enure as an exchange. And therefore if no livery of seisin so as it may take effect by way of Grant, it is utterly void. But by this means lands may be granted from one to another, for there needs no livery of seisin. So if an exchange be made by words between two of lands in one County, and before their entry Indentures are made between them of the same lands without words of exchange, and no livery of seisin is made; this shall not pass by way of exchange. And yet it hath been held by some, that *Permutatio*, or some other word of like effect, may supply this word Exchange. 3. That if any Rent, Reversion, Seignior, or the like, be granted by either party, that then the Tenant doe attorn to the grant, for that attornment is requisite in this case. And yet in the case of the grant of the land in possession in exchange, no livery of seisin is needful. Neither is it needful that either party to the exchange come to the thing given to him in exchange by the same mean and manner of assurance. For if lessee for life of one acre, give another acre to his lessor in tail in exchange for a release from him of that acre, To have and to hold in tail in like manner, this is a good exchange.

Livery of seisin.

Attornment.

Livery of seisin.

An exchange may be made to take effect in *futuro* as well as in *presenti*; for if an exchange be made between me and *T K*, That after the Feast of Easter *T K* shall have my Manor of Dale in exchange for his Manor of Sale, this is a good exchange.

If an exchange be made in writing of land, and it doth limit and expresse no estate that either party shall have in the thing exchanged, yet this is a good exchange. But if an estate for life be limited expressly to one, and no expresse estate is limited to the other; this is not a good exchange, as shall be shewed in the next place.

The fourth thing required in a good exchange is equality of estate, viz. That either party have the like kind of estate of the thing exchanged, so that if one have an estate in Fee simple the other have so likewise, and so for other estates. For if the one grant that the other shall have his land in Fee simple for the land which he hath of the other in Fee tail; or that the one shall have in the one land Fee tail, and the other in the other land but for term of life; Or that the one shall have in the one land Fee tail general, and the other in the other land Fee tail special; or that the one shall have in the one land for life, and the other in the other

4. In respect of the quality, or equality of the estates or interests exchanged.

Perk. Sect.
289. 263.
229. 276.

Perk. Sect.
265.

19 H. 6. 19.
Perk. Sect.
275.

Fitz. Ex.
change 15.
Lit. Se. Ct.
64. 65.
Co. super
Lit. 50. 51.
Perk. Sect.
276.

land but for yeares; these exchanges are void, and cannot take effect as exchanges. And therefore if the Lord release to his tenant his services in taile in exchange for other lands given to the Lord in exchange in taile also; this exchange is void: For by this release made by the Lord, the services are gone for ever. So if tenant for his own life, exchange with him that is tenant for life of another; this is not a good exchange. (And yet by the same reason it should seem, if lessee for twenty years of his land, exchange with another for other land for forty years, that this should not be a good exchange.) But if lessee for life be of an acre of land, and he give another acre of land to his lessor in fee tail in exchange for a release of all his right in the acre that he holdeth for term of his life. To hold to him and the heirs of his body engendred; this is a good exchange. Or if tenant for his own life exchange with him that is tenant in taile, after possibility of issue extinct; this exchange is good. And yet if an estate for life be expressed to the one party upon the exchange, and no estate is expressed to the other party; it is said that this exchange is not good, and yet where no estate is expressed, the party shall have an estate for his own life.

Husband and
wife.
Tenant in tail

But in these cases it is not necessary that the parties to the exchange be seised of an equal estate at the time the exchange made: for if tenant in tail, or husband in right of his wife, exchange their land in Fee simple with another for lands he hath in Fee simple; this is a good exchange until it be avoided by the issue or the wife. Neither is it necessary that both estates be in possession: for one may grant an acre in possession in exchange for an acre in reversion, and this exchange is good. Neither is it necessary that there be an equality in the value or quantity of the lands exchanged; for if the land of one of the parties be worth one hundred pound, and the land of the other but ten pound; or the land of one of the parties be an hundred acres, and the land of the other but ten acres, if the estates given be equal, the exchange is good. Neither is equality in the quality or manner of the estates requisite: For if two Joyntenants be in fee of an acre of land, and they grant that acre to another in exchange for other lands, To have and to hold a moiety to one of them and his heirs, and a moiety to the other and his heirs, which is an estate in common: or two of them give land in exchange to A and his heirs for lands from A to them two and their heirs, albeit the one party hath a joynt estate, and the other a sole estate, yet the exchange is good. The like law is if the land of one of the parties be of a defeasible title, and the land of the other of an undefeasible title, this exchange is good till it be avoided.

Perk. Sec.
283.

Perk. Sec.
275.
Finches.
ley 27.

Perk. Sec.
276.

Co. 11 80.

Perk. Sec.
275.
19H. 6. 27.

Co. super
Lit. 5u
Perk. Sec.
289.
Lit. sec. 6.
Perk. Sec.
280. 281.
Idem.

Idem.

Idem.

The

Co. Super
Lit 50. 51.
Co. 1. 98.
101.
Perk. Sect.
284. 286.
292. 289.

The fifth and last thing required in a good exchange is, that there be an execution and perfection of the exchange by entry or claim in the life time of the parties: *viz.* That both the parties to the same exchange do enter into the things taken in exchange, if they be such things as they may enter into, for untill the exchange be executed by entry, or the like, the parties thereunto have no freehold in deed or in law in the things exchanged, albeit the same things do lie in one County: and if either of the parties die before he enter into the lands by him taken in exchange; hereby the whole exchange is become void, if hi sheir will; but if one of the parties enter, he shall not first begin to avoid the exchange. But if the parties enter at any time during their lives it is sufficient, unless the possession be before devided by an elder title, as by entry for a condition broken, entry by a disseisee of his heir, or the like, and not re-vested again before the entry. As if an exchange be had between two of land, and before their entry by force of the exchange they are, or one of them is disseised of the land exchanged, and the disseisor die seised thereof, and then they enter according to the exchange, and put out the heir of the disseisor; this shall not be said to be an execution, of the exchange, but if the disseisee have recovered the same land against the heir of the disseisor by writ of entry, and have execution, then he may execute the exchange by entry. And in case where a reversion, rent, or seigniory is granted in exchange, it must be perfected and executed by the attornment of the tenant in the life time of the parties, otherwise the exchange is not good; but in this case after attornment is made, it seems the exchange is perfect without any entry or claim.

5. In respect of the execution of it.

Perk. S. Ct.
257.

If two Parsons exchange their Churches, and resigne them into the Bishops hands, this is not a perfect exchange until they be inducted, and therefore if either of them die before they be both inducted, the exchange is void.

Perk. Sect.
255. 256.
Fitz. Ex.
change 14.
Perk. Sect.
272.

Where a deed shall take effect as an exchange, there must be all the conditions before mentioned in the case. And yet note that where one thing is granted for another in the nature of an exchange, and for some of the causes aforesaid, the things cannot pass by way of exchange, there they may pass notwithstanding by way of grant, and the deed may take effect to other purposes, albeit it may not enure and take effect as an exchange; And therefore if two be seised of several acres of land, and the one of them by deed doth give his acre to the other, and the other his acre to him without any word of exchange, and each of them doth make livery of seisin to the other: in this case albeit the acres will not pass by way of exchange, yet will they pass by way of grant. And in this case if no livery of seisin be made, either of them shall hold the lands granted at will onely, And in like manner it is if two

4. When a deed shall take effect as an exchange. Or not.

agree

agree to exchange land, and after either of them levy a fine, or make a Feoffment of the land to other, by this the land will pass each to other, but not by way of exchange. So if *A* and *B* his wife, and *C* and *D* his wife agree to exchange lands, and *A* and *B* enter into the land they are to have in exchange, and then they do make a Feoffment of their own land unto *C* and his father, and not to *C* and *D* his wife; this shall not enure as an exchange, and therefore *C* and *D* may enter upon their own land again, but the Feoffment is good. And if one assigne a woman her dower in exchange for land; this shall not take effect as an exchange, but it shall enure to be a good assignment of dower.

5. How an Exchange shall be construed and taken.

If two doe exchange land by deed, and limit no estates, this shall be taken for estates for life, and the exchange is good: but if an express estate be limited to one, and no express estate to the other, it is said this estate is not good, and that construction of law will not help it.

19 H. 6. 29.
Perk. Sed.
255.

If an exchange be made between two men of two acres of land by deed, and in the *Habendum* it is set down that each of them shall have the acres given in exchange with divers other acres not expressed in the premises, this addition shall be taken as surplusage, and the exchange shall be good for the two acres. See more in *Exposition of Deeds*.

Perk. Sed.
251.

6. Where an Exchange shall be determined, or the nature of it changed by matter *ex post facto*. And how. And where not.

If after an exchange is made before or after the parties enter, all or part of the land given to either party be recovered from him upon an elder title, as by an entry upon a condition broken, alienation in mortmain, or upon a disseisin, in these cases if that party enter again upon his own land which he gave in exchange (as he may) hereby the whole exchange is determined. But if after the exchange is perfect, one of the parties doe enter upon the land he doth give in exchange, this doth not make void the exchange, neither may the other party hereupon enter upon the land he doth give in exchange, but he may have an assise, or an action of trespass against the other. And yet if an exchange of a common for a way, or a rent, or the like, if the one party deny the common, it hath bin said the other party may deny the way or the rent. *Sed quere*.

Perk. Sed.
286.
Co. 4. 122.
Perk. Sed.
299.
Bro. Exchange 12.

If an exchange be made of fee between two of a Manor, whereof the one half is in tail, and the other half is in Fee simple, and the tenant in tail that made the exchange die, and his issue disagree to it, so that the exchange of the tailed land is become void; this doth determine the whole exchange, for when an exchange becometh void in part, it becometh void in all, and untill it be avoided it is good for all. As if one be seised of white acre, and he exchange white acre and black acre (which is none of his) with another for two other acres, this shall continue for a good exchange, and not to be avoided untill he that hath right to black acre doth evict him that hath it in exchange.

Perk. Sed.
299.

Bro. Exchange 8.
Perk. Sed.
297.

If

Co. 4. 122.
Perk. Sec. 296, 297, 298, 299.

If an exchange be made by tenant in tail, and his issue after his death waive the possession of all or part of the land taken in exchange, and disagree to the exchange, hereby the whole exchange is determined. So if the wife after the husbands death, the infant at his full age, or the heir of him that is *de non sane memorie*, disagree to the exchange of the husband, the Infant, or him that is *de non sane memorie*; hereby the whole exchange is determined, and no subsequent agreement can make it good again.

15 E. 4. 3.

If two doe make an exchange by word of mouth, and after before either of them enter, they make Indentures of the lands exchanged, and grant the same from one to another; it seems hereby the nature of the exchange is changed, and the exchange determined.

Perk. Sec. 285, Co. 1. 105. Dic. 285. Perk. Sec. 290, 294. 298, Co. 1. 98.

The parties themselves and all privies and estrangers for the most part may take advantage of such exchanges as are void for the defects before named: but when the exchange is only voidable, *contra*. And therefore when an exchange is made by an infant, the infant himself at his full age, or his heir, & none other may avoid it. And when an exchange is made by a tenant in tail, the issue in tail after the death of his ancestor, and none other may avoid it. And when an exchange is made by the husband, or husband and wife of the wives land, the wife after the husbands death, or heir of the wife after her death, and none other may avoid it. And when an exchange is made by a man of *non sane memorie*, his heir after his death, and none other may avoid it. But in all these cases of Infant, tenant in tail, woman covert, and a man *de non sane memorie*, and where lands are recovered by an elder title, the other party may not enter and avoid the exchange, untill the infant, issue in tail woman, or him that is *de non sane memorie*, or him that doth lose the land by an elder title, doth first enter.

7. Who may take advantage of a void or voidable Exchange. Or not. And when. Infant. Tenant in tail. Husband and wife. *Home de non sane memorie*.

Co. Super Lit. 51. 12 E. 4. 11. Perk. Sec. 290, 294. Fitz. Exchange 12. Perk. Sec. 291, 279. 293, 298.

If an infant exchange lands, and after at his full age occupy the lands taken in exchange for his own lands; hereby the exchange is made good. So if tenant in tail exchange his intailed lands with another; and after his death the issue occupy the lands taken in exchange by his ancestor, hereby the exchange is made good for the life of the issue in tail. So if the husband and wife exchange the lands of the wife for other land, and she after her husbands death agree to it, and enter into, and agree to the lands taken in exchange; hereby the exchange is made good: but if the husband alone make an exchange of his wives land, and she after his death agree to this and enter into the land, it seems this will not make the exchange good. And if a man seised of land in right of his wife, in Fee thereof infeoff a stranger, and take an estate back again to him and his wife, and a third person in Fee, and they three joyn in exchange of the same land in Fee for other lands to a stranger in Fee, and the exchange is executed; and the husband dieth, and she doth occupy the

8. Where an exchange voidable at first doth become good by matter *ex post facto*. Or not. Tenant in tail Husband and wife.

the land taken in exchange with the other third person; hereby the exchange is made good. If a man *de non sane memorie* make an exchange, and his heir after his death enter into the land taken by his ancestor in exchange, and agree to the exchange; hereby the exchange is made good. And in all these cases when the exchange is once by agreement made good, it can never by any subsequent disagreement be afterwards made void.

And now from hence we come to a *Surrender*, a special way or means for the giving or transferring of something to another, that hath already some interest into the same thing,

CHAP. XVII.

Of a Surrender.

1. Surrender,
Quid.

Surrendror.
Surrendree.
2. *Quoruplex.*

A Surrender properly taken, is the yielding or delivering up of lands or tenements, and the estate a man hath therein unto another that hath a higher and greater estate in the same lands or tenements. But it is sometimes improperly applied to other things. He that doth Surrender is called the surrendror, and he to whom it is made is called the Surrendree.

And there be three kinds of surrender, *viz.* A surrender properly taken at the common law. 2. A surrender by custome of lands holden by custome or of customary estates, whereof we speak not here. 3. A surrender improperly taken, as of a deed, or grant of a rent-charger of a patent, and of land in fee simple to the King. The surrender properly taken is of two sorts: 1. Express or in deed, which is when it is done by apt words, and the express agreement of the parties. 2. In law or implied, which is when it is wrought by consequent and operation of law, or when the law doth interpret or enure something done to another intent, to make a surrender of it. And in the first case it is sometimes by word only, and sometimes by writing. And when it is by writing, it is said to be an instrument testifying by apt words, that the particular tenant of the lands or tenements for life or years, doth consent and agree that he which hath the next and immediate remainder or reversion thereof, shall also have the particular estate of the same in possession, and that he yeeldeth the same unto him.

3. The effect
of it.

The fruit and effect of a surrender is, that it doth pass the estate of the surrendror to the surrendree, and that hereupon the estate of the surrendror is drowned, and extinct in the estate of the surrendree; And yet not so, but that to some purposes it shall be

said

Co. super.
Lit. 337.

Co. super.
Lit. 337.
318.
Co. 6. 66.
Plow. 306.
307. Wel.
Symb. 1.
part. lib.
cap. 460.

Co. super.
Lit. 338.
Co. 4. 66.
Bro. Surrender.
Perk. 20.
591.

said to have continuance still. And therefore if tenant for life grant a rent-charge, and after doth surrender his land, in this case the rent-charge shall continue notwithstanding the surrender. So if lessee for life make a lease for years rendring rent, and the lessee for life surrender his estate, in this case albeit the primitive estate for life be yeilded up, yet the derivative estate for years shall continue notwithstanding, but the surrendree shall not have the rent reserved upon the lease for years. So if lessee for life or years break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not hereby salved, for the lessor may have an action of covenant still notwithstanding the surrender. And if one seised of land grant a rent out of it in fee, and this rent is extended on a statute or granted for less time to another, and then the grantee doth surrender the deed of the grant of the rent to the tenant of the land, in this case the rent shall continue as to him that hath execution and the grantee. And if one make a lease for years rendring rent, and the lessee surrender his estate to the lessor, hereby the rent is extinct: but if the lessor grant the rent to a stranger before the surrender *contra*. And if one lease for years, and the lessee let parcel of his term to his lessor rendring rent, and after the lessee surrender his whole estate, in this case it seems the rent is determined.

Extinguishment.

Covenant.

Co. B. 145.
7. 39. Bro.
Sur. 43.H. 8. 15.
Flow. 194.
Dier 28.
Co. 10. 67.Perk. Sect.
217.
Co. 5. 11.Fitz. Sur.
render 3.
Co. super
Lit. 248.
37 B. 6. 17.Dier 240.
143.Dier 273.
Wor. 178.
177. Co. 5.
24. 55.
Kell. 70.

If lessee for life or years take a new lease of him in reversion of the same thing in particular contained in the former lease for life or years; this is a surrender in law of the first lease. As if lessee for his own or anothers life in possession or reversion take a new lease for years; Or a lessee for forty years take a new lease for fifty years; the first lease in both these cases is surrendered. And this rule holdeth albeit the second lease be for a lessee time then the first, as if lessee for life accept a lease for years, for lessee for twenty years accept a lease for two years. And albeit the second lease be voidable as being made upon condition, as if lessee for twenty years take a new lease for twenty years upon condition that if such a thing happen the second lease shall be void, and the thing doe after happen; in this case both these leases are become void: As where the lessor doth grant the reversion to the lessee upon condition, and after the condition is broken. Or if the second lease be made by tenant in tail, or the like: as if a man make a lease for years of land, and then make a feoffment to another of the land, and then take back an estate to him and his wife of the land; and then make a new lease to the lessee for ten years; this is a surrender in law of the first lease. But if the second lease be merely void, then it is otherwise. And therefore if the lessor doe by words of covenant only promise to his lessee that he shall have a new lease, and doe never actually make him, this is no surrender in law. And this rule as it seems holdeth

4. VVhat shall be said a surrender in law of lands. And by what means an estate shall be surrendered in law. Or not. By acceptance and taking of a new estate.

holdeth also, albeit the second lease be to the lessee and a stranger, or to the lessee and his wife; and albeit the second lease be by word only, and the first lease be by deed, if so be that the thing granted by the lease, be such a thing as may pass by word without writing; and albeit the second lease be in another right, as if the husband have a lease for years in the right of his wife, and then take a new lease to himself in his own name: and albeit the first lease be to begin presently, and the second be to begin at a day to come, or *converso*: * and albeit there be a mean estate between, as if land be let to *A* for years, and after let to *B* for years, to begin after the first term, and the assignee of *A* doth take a new lease; So if one demise land for ten years to one, and after demise it for ten years to another, to begin at *Michaelmas*, and after the first lessee accept a new lease. For in all these cases there is a surrender in law of the first leases. And if there be two lessees for life, or years, and one of them take a new lease for years, this is a surrender of his moiety; whereby it doth appear that a surrender in law may be made of some estates which cannot be surrendered by a surrender in fait; for *fortior est dispositio legis quam hominis*. And hence it is that a corporation aggregate, may make a surrender in law without deed, although it cannot make an express surrender without deed. But if the lessee do onely licence the lessor to make a feoffment, and to give livery of seisin: or do give livery of seisin for him as his Attorney: or do licence him to enter into the land and no more, neither of these things shall be said to be a surrender in law. So if the second lease be made of another, and not of the same thing whereof the first lease is made, as where the first lease is of the land, and the second is made of a rent or other profit to be taken out of the land, or the first is of a manor, and the second of the Bayliwick or stewardship of the manor, or the first is of a Park, and the second is of the keepership of the Park; in these cases there is no surrender of the first lease. Also if the second lease be not a good lease, perhaps it shall not be construed a surrender. See *Co. 2, Lane's case* 17.

But if the first lease be of the land it self, and the second lease is of the vesture of the same land, this is held to be a surrender of the first lease. * So if the second lease be not to begin untill the first lease end, the taking of this second lease is no surrender of the first lease. So it hath been said if one make a lease of black acre in Dale, and the lessee accept a second lease of all the lands of the lessor in Dale in general words, and the lessor that doth make the lease have divers other lands there besides this acre, that this is no surrender of the first lease. *Sed quare* of this, for others do much doubt it. So if one enter into land, and make a lease for the trial of the title only, and after the lessor (he and the lessee being both out of possession)

Dier. 140.
241. 1.

Dier. 178.

Pasc. 40 E.

Co. super

Lit. 338.

Co. 6. 6a

to. 53. 67.

5. 11.

Dier. 28a.

* Dier. 23.

112.

Dier. 46.

Co. 2. 6a.

Co. 6. 6a

40. 67.

Perk. Sed.

6. 8. Bro.

Surrender.

48. Trin.

5. Jac.

Co. 6. 6a.

Adjudged.

Trin. 5 Jac.

Sir Jo.

Chamber-

lains case.

See Dier.

200.

* Co. 5. 11.

Per Curiam

B. R.

19 Jac.

session) make another lease of the same thing to the lessee; it seems this is no surrender of the first lease: but if the lessor enter before he make the lease *contra*: To make a good surrender in deed of lands, and to make them to pass by such a surrender, these things are first of all required. 1. That the surrendror be a person able to grant and make, and the surrendree a person capable and able to take and receive a surrender, and that they both have such estates as are capable of a surrender. And for this purpose. 1. That the surrendror have an estate in possession of the thing surrendered at the time of the surrender made, and not a bare right thereunto onely. 2. That the surrender be to him that hath the next immediate estate in remainder or reversion. And that there be no intervenient estate coming between. 3. That there be a privity of estate between the surrendror and the surrendree. 4. That the surrendree have a higher and greater estate in the thing surrendered, then the surrendror hath, so that the estate of the surrendror may be drowned there in. 5. That he have the estate in his own right, and not in the right of his wife, &c. 6. And that he be sole seised of this estate in remainder or reversion, and not in jointenancy. As for examples, Infants, woman covert, mad and lunatick men, and all such like persons as are disabled to grant, are disabled to make a surrender, and none but such as may grant their land may surrender their land. A Corporation aggregate of many, cannot make an express surrender without a deed, but it may make such a surrender by deed. And such persons as are disabled to take by a grant, are disabled to take by a surrender; and such as may be grantees, may be surrendrees: And therefore a surrender made to an infant, is good. If the husband have a lease, or estate for years in the right of his wife, he alone, or he and his wife together, may surrender this: But if the husband have an estate for life in the right of his wife, being tenant in dower or otherwise, and he alone, or he and she together surrender this; this surrender is good onely during the life of the husband, except it be made by fine. One executor may surrender an estate or lease for years which the executors have in the right of their testator. If there be two tenants in common, and one of them have the particular estate, and the other the Fee simple; as where an estate is limited to two and the heirs of one of them, and he that hath the estate for life doth alien his part to a stranger; in this case the alienance may surrender to the other joyntenant: So if there be three joyntenants for life, and the fee simple is limited to the heirs of one of them, and one of the joyntenants for life doth release to the other, and he to whom this release is made, doth surrender to him that hath the fee simple, this is a good surrender of a third part: but otherwise one joyntenant cannot surrender to another joyntenant, albe it he be tenant for life which.

See Per. B. in his chap. of Surrender in toto. Bro. Surrender in toto. Fitz Surrender in toto. Co. Super. tit. 33b.

3. What shall be said a Surrender in deed of lands.

And when they shall be said to pass by such a surrender, or not.

1. In respect of the person between whom it is made, and their estate and possession.

Co. 10. 67.

Perk. Sect. 612. 613. Bro. Surrender 44.

21 H. 7. 35.

Perk. Sect. 586. 587. Fitz Surrender.

Husband and Wife.

Executors. Tenant in common.

Jointenants.

Livery of
seisin.

which doth make and the tenant in Fee simple that doth take the surrender. A lessee for life or years, may surrender to him that is next in remainder in Fee simple, or Fee tail, or to him in reversion in Fee, and this is a good surrender, and a surrender as it seems may be made to the grantee of the reversion before attornment, so as attornment be afterwards made. And in case of the surrender of an estate for life there needs no livery of seisin, as in case of the grant of an estate for life. A lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender before the day the term begin, as he may by a surrender in law. If lessee for life be disseised, or lessee for years be ousted, and before his entry or the getting of the possession again, he surrender his estate to him in reversion; this surrender is void. So if a woman that hath title of dower, surrender it to him in reversion before she hath recovered it; this surrender is void. And yet if lessee for years after his term is begun and before his entry, when no body doth keep from him the profits, do surrender his estate; it seems this is a good surrender; but if another enter before him, and keep him out, it seems otherwise. If there be lessee for years, the remainder for life, the remainder or reversion in fee, and the lessee for years be ousted, and he that ousted him die seised, and then the lessee for years enter, and then the tenant for life surrender to him in remainder or reversion in fee; this is not a good surrender, for there is in this case but a bare right of remainder for life and in fee; but if the lessee for years had not been ousted, it had been a good surrender. If there be lessee for years, the remainder for life, the remainder in fee, the lessee for years may surrender to the lessee for life, and so may the tenant for life to him in remainder or reversion in fee, but if there be tenant for life the remainder for life, the remainder in fee, in this case the second tenant for life cannot surrender to him in remainder in fee. If a lease be made for life or years to *A*, the remainder for life to *B*, the remainder in fee tail to *C*, and the first tenant for life or years doth surrender to *C*, or to the lessor, *B* the next in remainder for life being then living; this is not a good surrender, neither can it take effect as a surrender in respect of the intervening estate. And so some say the law is if the middle remainder be but for years only: as if a lease be made for years, the remainder for years, and the first termor surrender his interest to the lessor; this is no good surrender. *Sed quare*. For it should seem that a future interest will no more hinder an actual surrender of the first lessee, then a surrender in law. And so also it seems the law is for a concurrent lease, which for the latter part of it is in the nature of a future interest. But if in this case it fall out the middle remainder be void, as where a lease is made to *A* for life or years, the remainder to a monk (who is a person incapable) for life or years, the remainder to *I S* in fee,

Perk. Sec.
584. Co.
Super Lit.
338.
Perk. Sec.
600.
Bro. Sur. 4.

Dier. 351.
358, 280.

Perk. Sec.
601, 602.
4 H. 7. 10.
Co. 6, 6.
Perk. Sec.
600, 613,
603, 603.

605. Dier.
251.

Perk. Sec.
588.

Dier. 111.
Plow. 190.
Dier. 23.
Plow. 433.
433.

Perk. Sect.
604.
24 H. 7. 3.
Plow. 541.
Bro. Sur. 16

Fee: in this case A. the first Tenant may surrender to him in remainder in fee, and the Surrender is good. If Lessee for twenty years make a Lease for five years, and the Lessee for five years enter, and after the Lessee for twenty years surrender to him in reversion or remainder, this is a good Surrender. So also if the two Lessees joyn in the Surrender. So also if the first Lessee surrender first, and the Lessee for five years surrender after; But if the Lessee for five years surrender to him in the reversion or the remainder before the surrender of the Lessee for twenty years; this cannot take effect as a Surrender for two causes: 1. Because there is a remnant of the term as an intervenient estate to hinder the drowing of the term. 2. Because there wants a privity between the Lessee for five years, and him in reversion. If Tenant in Fee simple surrender to the Lord Paramount of whom the land is held; this can never take effect as a Surrender, unless it be in a special case where the Lord hath cause to have a

Bro. Sur. 9.
Wiz. Sur. 10

Perk. Sect.
390.
Perk. Sect.
589.
Co. super
Lit. 43. 6.
61.
Perk. Sect.
390.

Cessavit. So if Tenant in tail surrender to him in remainder or reversion in Fee simple; this cannot take effect as a Surrender. So if Lessee for life surrender to him in remainder for years: or Tenant for the life of B. surrender to him that hath an estate for the life of C. these are void Surrenders, for the estates of them to whom they are made, are not capable of such Surrenders, for they are not greater then the estates of the Surrendrors, and therefore not able to drown the estates surrendred. And yet if Lessee for life of another, or for his own life surrender his estate to him in remainder that is Tenant for his own life; this is a good Surrender, for an estate for a mans own life is greater in judgement of law, then an estate for another mans life. And hence it is, that if a Lease be made to two for their lives, the remainder to a third person for his own life, and one of the first Tenants for life surrender his estate to him in remainder for life; this is a good Surrender for a moiety: If Lessee for life or years surrender to him in remainder or reversion that hath no good estate in the remainder or reversion, as where the remainder or reversion is granted by word only, or being granted by Deed, there is no Attornment of the Tenant to the Grant, or the like; this Surrender is not good. And yet if Tenant in tail make a Lease for life whereby he gaineth a new reversion (but defeasible) and the Tenant for life doth surrender to the Tenant in tail; this shall be a good Surrender. So if a woman inheretrix have a Husband, and they have issue a Son, and the Husband dieth, and she take another Husband, and he letteth the land for life, and the Wife dieth, and the Tenant for life doth surrender his estate to the second Husband; this is a good Surrender to most purposes.

Co. 2. 66.

Co. super
Lit. 398.

Perk. Sect.
612.

If a Feme sole be seised of land in Fee, and she make a Lease thereof to a stranger for life, and then take a Husband, and the Lessee sur-

render

render to the Husband; this is no good Surrender, neither can it enure so, because he to whom it is made, hath not the reversion in his own but in his Wives right.

2. In respect of the place where it is made, and where the Surrender of lands in one County may be good for the lands that do lie in another County. Or not.

3. In respect of the matter or thing. And of what things a Surrender may be made. Or not.

4. In respect of the manner. And how, and by what words a Surrender may be made. And where it may be made without deed, and upon condition. Or not.

It is further also required in every good Surrender, that if it be made by word and without Deed, that then it be made in the same County where the land to be surrendered doth lie, but by writing a man may make a Surrender of lands that do lie in any other County, and in what place soever it doth lie. And a Surrender may be by word or writing of lands lying within the same County in any place out of the land. And therefore if Tenant for life surrender to him in reversion in any place out of the land within the same County and the Surrendree agree to it, the Freehold is in him presently.

3. That it be made of such things, of which a Surrender may be made. For Surrenders may not be made of estates in Fee simple, or Fee tail, nor yet of rights and titles onely of estates for life or years, nor yet of part of an estate for life or years, as if a man have a Lease for ten years, he cannot surrender the last seven years, and keep to himself the three years. But otherwise one may surrender any kinde of estate for life, as by dower, by the curtesie, or as Tenant in tail after possibility of issue extinct, or for years, or years determinable upon lives, and that of any Messuages, Houses, Lands, Commons, Rents, or the like, that are grantable from one

to another, and such Surrenders are good. 4. That there be words, or words and deeds sufficient to make the mind of the Surrendror to appear that he is willing or desirous to part with, and yield up the thing surrendered into the hands of the Surrendree. And herein it is to be known, that albeit the words Surrender, Give, or Yield up, be the most significant and proper words whereby to make a Surrender, yet any other words, especially if it be in the Surrender of a Lease for years, that do testifie and declare the will and assent of him that is the particular Tenant that he in the remainder or reversion shall have the estate of the Tenant, be sufficient to pass the estate by way of Surrender. And therefore if Lessee for life or years do by word or writing say, that he will hold the land no longer, and wish him in reversion or remainder therefore to enter. Or that it is his desire that he shall enter into the land, and have it and his estate therein: or that he is content that he shall have his estate, or have his Lease, such, or any such like declaration as this made to him in reversion or remainder, will be a good Surrender. So if

Lessee for years deliver his Indenture to a stranger, to deliver it and all his estate up to him in reversion, and do appoint the stranger to deliver and surrender it to him in reversion, and he do so, and he in reversion accept thereof, this is a good Surrender. But otherwise it is of an estate for life. So if the particular Tenant do by the words Give, Grant, or Confirm, pass his estate

Bro. sur. 2.
8. Fitz. part. 1.
Perk. sed. 584

Bro. sur. rend. in toto.
Per. chap. sur in toto.
Co. 5. 11.
Super. Lit. 138.

Perk. sed. 607, 618.
6. 9.
Dier 251.
Bro. sur. 1.
25 17.
47. 22 H.
7. 7.

Hil. 37 Ed. 3.
Br.
Sleigh and Batemans case.

state.

state to to him in reversion, and he do enter and agree to it: this is a good Surrender: And by all these Surrenders the estate will pass by way of Surrender, except it be in some special cases where the intents of the parties doth plainly appear to be that the estate shall not pass by way of surrender. But if a Lessee for life or years, do only go from the house or land, and carry away his Goods and Cattel, and so waive the possession for a time, either because the Lessor shall not distrain them for rent behinde, or the like, and thereupon the Lessor doth enter and enjoy it: this is no Surrender, neither is this a good yielding up of his estate. And in

Perk. Sect.
381, 382,
383.
Fitz. sur. 1.
Co. super
Lit. 358.

such a manner and by such words as before, any thing that may be granted by word without writing, may be surrendered by word without writing, so as it be made within the same County where the thing surrendered doth lie. And this holdeth true albeit the estate to be surrendered were created by Deed: But such things, as Commons, Rents, Advowsons, Reversions, Remainders, and the like, that cannot be granted without Deed, cannot be surrendered without Deed: And therefore if a Lease be made for life, the remainder for life by word of mouth without any writing, he in the remainder for life, cannot surrender his remainder for life without Deed. So where one hath a Rent, Advowson or the like, as Tenant in dower, or by the courtesie: this cannot be surrendered without Deed. And in case where there is any special matter to be contained in the Surrender, as reservation of Rent, Condition, or the like, there for the most part it must be by Deed, or it will not be good. And therefore if Tenant for life declare himself by word of mouth to be contented, and agreed that he in the reversion shall have the land and his estate therein, rendering ten shillings a year rent: or paying such a sum of money, or upon condition that if he survive the Lessor, he shall have it again,

Dier 351.
Bro. sur. 16.

&c. this is no good Surrender. And a Surrender may be made also upon a condition precedent or subsequent, as if it be with reservation of rent, that if it be not paid, it shall be void: but if it be an estate for life that is so surrendered, it seems it must be made by writing indented, and so likewise it should seem the law is of the Surrender of a Lease for years upon a condition, or however it is most safe so to do. 5. That the Surrendree do agree to, and accept of it, for until then, the Surrender is not perfect: but if the Surrendree do once agree to it, he cannot after disagree, for his first agreement doth perfect the Surrender. But the actual entry of the Surrendree into the land, is not necessary. And therefore if Tenant for life or years surrender to him in reversion our of the land, and he agree to it, he hath the land in him presently. And yet he may not bring an action of Trespass against any man

Perk. Sect.
624, 625.
Co. super
Lit. 218.

Perk. Sect.
618.
Lit. Bro.
363.

5. In respect of the agreement of him to whom the Surrender is made, And what agreement is necessary, Agreement.

for any Trespass done upon the land until he have made his entry.

But here note, that in the cases before where things may not pass by way of Surrender, either because of an intervenient estate, or the like, if there be sufficient words in the Deed, it may avail to other purposes, and may enure and pass the thing by way of Grant; but then if it be an estate for life that is intended to be surrendered, there must be livery of seisin made upon the Deed: And wherefore if there be Lessee for years, the remainder for life or years, the remainder in Fee, and the Lessee for years in possession doth surrender and grant all his estate to him in remainder in Fee; howsoever this Deed cannot enure as a Surrender, yet it shall enure as a good Grant of the estate of the Lessee for years unto him in remainder in Fee.

Perk. 2da.
588, 589.

6. How a Surrender shall be construed and taken.

A Surrender in general shall be taken most strongly against the Surrendror, and most beneficially for the Surrendree. And therefore if I hold of the Lease of *A* one acre for life, and another acre for years, and I surrender to *A* all my lands, or all my lands I hold of his Lease, by this Surrender both the acres are surrendered. But if the Surrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the Lease of *A*, *contra*. And if I hold one acre for life of the Lease of the Father of *I* himself, and I hold another acre for life or years of the Lease of *I* himself, and I surrender to *I* all the land I hold of his Lease, by this the land that I had by the Lease of his Father doth not pass. A Surrender to one Joyntenant shall be construed to enure to them all. But if Tenant for life or years grant his estate to one of the Joyntenants in reversion, it seems this shall not enure as a Surrender to them all, but as a grant to him alone.

Perk. 2da.
610, 611.

If the Lessor, make and the Lessee take a new Lease upon condition, this Surrender in law is absolute, and albeit the condition be broken, yet the first Lease is gone. But if the Lessee Surrender or grant his estate to the Lessor upon Condition, this Condition if it be broken may revest the estate.

Perk. 2da.
615.
Br. 100. 4a.
Co. 100. 1.
Lit. 192.

7. Where a Feoffment, Lease, Grant, or other act made, or done by the tenant for life or years, shall be a Surrender or not. And how it shall enure or be construed and taken.

See more in the next question, and in *Exposition of Deeds*.

If any kind of Tenant for life of land in fee off him in remainder or reversion of the land, or grant his estate to him in remainder or reversion, this shall enure as a Surrender. And if Lessee for years before his term do begin, make a Feoffment to him in reversion or remainder or grant his estate to him; this shall enure as a Surrender. And if Lessee for life grant his estate to him in reversion, the remainder in Fee to another; this shall enure as a Surrender, and this remainder is void. But if such a Tenant for life make a Lease to him in remainder or reversion for the term of the life of him in remainder or reversion; this shall not enure as a Surrender.

Br. 100. 1. 4.
Perk. 2da.
616, 630.
633.
Co. Super
Lit. 42.
Br. 100. 4a.

1. When it is made to him in reversion or remainder.

because

because it doth not give the whole estate, but it shall enure by way of grant. So if Lessee for life make a Lease to him in remainder in tail for term of the life of him in remainder; this shall not enure as a Surrender, but as a Grant, and shall end with the life of the Grantee. If Lessee for forty years make a Lease for thirty seven years on condition, and after grant his estate to him in reversion, and the second Lessee attorn; this shall enure as a Surrender. If there be Tenant for life, the remainder in tail to a stranger, and the remainder in tail to another stranger, the remainder in Fee to the Tenant for life, and the Tenant for life doth make a Feoffment to the first Tenant in tail; this shall enure as a Surrender of the estate for life, and as a grant of the reversion in Fee also. If Tenant for life being a woman take a Husband, and then her Husband and she by Deed indented make a Lease to him in reversion for the life of the Husband; this shall not enure as a Surrender, but as a Grant. If there be Tenant for his own life, the remainder to *I S* for his life, and the first Tenant for life surrender to him in remainder for the life, of him in remainder; it seems this shall enure as a Surrender, and is no forfeiture; but if he grant it to him for the life of a stranger, and make livery of seisin, this is a forfeiture. If Lessee for life the reversion being in Joyntenants, grant the land to one or all of the Joyntenants for twenty years: this shall not enure as a Surrender, but as a Grant, for there remains an interest in the Lessee still as a mean estate. If Lessee for years make him in reversion or remainder his Executor: this shall not enure as a Surrender, albeit it do give him the whole estate. If lands be given to the Husband and Wife, the remainder to *I S*, and the Husband discontinue in Fee, and take back an estate to him and his Wife, the remainder to *W N*, and die, and the Wife claim in by the second estate, and surrender to *W N*: this shall not enure as a Surrender but as a grant. If Lessee for life or years grant his estate to him in remainder or reversion and a stranger: this shall enure as a Surrender of the one half to him in reversion, and as a grant of the other moiety to the stranger. And yet it is said, that if Lessee for life of land grant his estate to him in the reversion and two others, that hereby they have a joynt estate, and the survivor shall have the whole. If Lessee for life make a Lease for his own life to the Lessor, the remainder to the Lessor and a stranger in Fee: this shall enure as a Surrender of the one moiety and a forfeiture of the other moiety. If Tenant for life surrender to the Husband of a woman Tenant in tail or in Fee: this shall enure as a Grant, not as a Surrender. And so also it seems is the law when the Surrender is to the Husband and Wife. And if *B* be Tenant for life, the remainder to *C* in tail, the remainder to *D* in tail, and *B* infeof *C* and *S* his Wife in Fee: this shall not enure as a Surrender, but it is a Forfeiture: so that if *C* die without issue,

Forfeiture.

2. When it is done or made to him and a stranger.

Forfeiture.

3. When it is done with him in reversion or remainder.

May enter. If there be Lessee for life, the reversion to two Co- parcenors and one of them take a Husband, and the Lessee doth grant his estate to her and her Husband; this shall not enure as a Surrender, but as a grant. And yet if Tenant for life do grant his estate to the Husband and Wife, the having the reversion if she be an Infant and within age at this time, it seems this shall enure as a Surrender not as a Grant. If Tenant for life or years, and he in reversion or remainder by word without Deed joyn in a Feoffment; it shall be said the Surrender of the estate for life or years to him in the reversion, and the Feoffment of him in the reversion. But if he in reversion infeoff the Tenant for life without any Deed, this shall enure first as a Surrender of the Lease for life, and then as a Feoffment. See more in *Deed, Numb.*

Perk. Sec.
623. 311.
7 40.

Bro. Sur. 34

Plow. 140.
Dier 356.

8. Where a Deed or rent may be surrendered. And how such a surrender shall enure or be taken.

If I have a rent in Fee for life or years, issuing out of another mans Manor or other lands, I may surrender it, for if I deliver the Deed of the grant of the rent to be cancelled unto any one that hath any estate of the Manor or land in Fee simple, for life or years, in possession or remainder, either solely by himself, or jointly with others, this is a good Surrender, and hereby the rent is extinct and gone. But one that is Tenant in tail of a rent cannot surrender it, neither will the delivering up of the Deed in this case determine the rent. And if one be seised of land out of which a rent is issuing in Fee, and is disseised, and during the Disseisin, the Grantee of the rent surrender his rent, and give up his Deed; it seems this doth not extinguish the rent, yet hath the Grantee no remedy for his rent when he hath delivered up his Deed. And yet if one be seised of land in Fee, out of which a rent is issuing in Fee, and he die without heir so that the land escheat, and before the Lord enter upon his escheat, he that hath the rent, doth surrender the Deed of the rent to the Lord; it seems this is a good Surrender to extinguish the rent. And if the Grantee of a rent-charge in Fee, grant the same to him in Fee that is seised of the land in Fee, this shall enure to extinguish the rent; but if he grant it to one that hath only an estate for life, *contra.*

14 H. 7. 3.
Perk. Sec.
591. 585.
606. 590.
596. 598.

Perk. Sec.
594.

Perk. Sec.
595.

Perk. Sec.
597.

And now by this time it is high time we come to *Confirmations and Releases*, which serve to enlarge and amend the estate and interest that a man hath in a thing already.

CHAP.

CHAP. XVIII.

Of a Confirmation.

Terms of
the Law
Co. Super
Lit. 295.

A Confirmation is the conveyance of an estate or right that one hath into lands or tenements to another that hath the possession thereof, or some estate therein whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged. And this albeit it may be made by other words as by *Dedi* or *Concessi*, which are general words, and serve to make a Grant, Feoffment, Lease, Release, &c. yet it is most commonly and properly made by these words, *Confirmasse, Ratificasse & Approbasse*, which do signifie *ratum et firmum facere, & supplere omnium defectum*. And he that makes the Confirmation is sometimes called the Confirmor, and he to whom it is made the Confirmee.

1. Confirmat
on. *Quid.*

Co. Super
Lit. 295.
Plow. 140.
Lit. Sect.
515.
Co. 9. 142.

There are two kinds of Confirmations, viz. a Confirmation implied or in law, which is when the law by construction makes a confirmation of a Deed made to another purpose, and a Confirmation express or in deed, which is when the act done or Deed made is intended for a Confirmation. And both these are always in writing. The latter is properly called a Deed or instrument of confirmation, and is made after this manner, *Noveritis universi, &c. nos A de B, ratificasse, approbasse & confirmasse C de D statum & possessionem quos habet de & in uno Mesuagio, &c. cum pertinentiis in F, &c.* A Confirmation is also distinguished by his effects, for sometimes it doth tend and serve to confirm and make good a wrongful and defeasible estate, or to make a conditional estate absolute. And then it is said to be *Confirmatio perficiens*. And sometimes it doth tend and serve to encrease and enlarge a rightful estate, and so to pass an interest. And then it is called *Confirmatio crescens*. And sometimes it doth tend and serve to diminish and abridge the services whereby the Tenant doth hold. And then it is called *Confirmatio diminuens*.

Confirmor.
Confirmee.
2. Quotuplex.

Co. 146,
149.
Dier. 109.
7 H. 6, 7.
Lit. Sect.
539.
Co. 9. 242.

The nature and work of this where it doth find a foundation to work upon, is either to encrease and enlarge the estate of him to whom it is made from a lesser to a greater, and to give him some new interest he had not before, or to corroborate and perfect the estate that was imperfect before, or to change the quality of it, from an estate upon condition, to an absolute estate or otherwise, for this a Confirmation will do. In some cases also it will extinguish rights and titles of entry. But it will not make an estate good that is merely void, nor add, nor take from an estate a defendible quality, and make a man capable of it that is incapable of himself,

3. The nature
and operation
of it in general.

or *contra*. In some cases also it will lessen and diminish rents or services. But it cannot neither will change the nature of the service into some other kind of service, nor increase it into a greater service.

4. Where the Confirmation of some persons is needful to perfect the grant of others. Or not. And how it may be done.

If a Bishop, Dean, Archdeacon, Prebend, or the like, make any Lease of the land they have in the right of their Bishoprick, Deanry, Archdeanry, or Prebendship not warranted by the Statute of 32 H 8 and within the other Statutes; it seems this Lease must be confirmed by the Dean and Chapter by their common seal, and if there be two Chapters, it must be confirmed by them both, or otherwise it is not good. But if the Lease be such a Lease as is warranted by the Statutes, the Bishop may make it without the Confirmation of the King, the Patron, and founder of Bishopricks, or the Dean and Chapter, and so also it seems of the rest. And a Corporation aggregate as Dean and Chapter, Master and Fellows, and the like, may grant without any confirmation of the Founder, and this grant will be good. If a Bishop, &c. grant an ancient Office belonging to his Bishoprick, albeit it be but for the life of the Grantee, yet it must be confirmed by the Dean and Chapter, otherwise it is not good. If a Parson or Vicar had made any Lease for longer time than his own life, it must have been confirmed by the Patron and Ordinary. But at this day albeit it be confirmed by the Patron and Ordinary, yet the Lease is good for no longer then during the Parsons ordinary residence, except it be impropriated.

If Tenant for life grant a rent charge to I S and his Heirs; in this case he in reversion must confirm it, otherwise the grant of the rent will be good for no longer then the life of the Tenant for life.

Where a man hath an interest in any Lands, Tenements, Rents, Commons, Felons goods, or the like, by any grant of any of the Kings of the Realm, he need not have the Confirmation of any or of every succeeding King. Also it seems grants of Fairs, Markets, Warrens, and the like, made by one King, will be good in law against his successors without any Confirmation. But all such as have any judicial or ministerial Offices, Commissions and Authorities derived from the King, must have the Confirmation of every succeeding King, otherwise they may lose them.

* 5. What confirmations may be made. And what shall be said a good express or implied confirmation, or not. And by what words it may be made.

* In every good Confirmation tending to confirm an estate, or alter the quality of it, these things must concur: 1. There must be a good Confirmor and a good Confirree, and a thing to be confirmed, as in other grants, and the Deed must be well sealed, &c. 2. There must be a precedent rightful or wrongful estate in him to whom the Confirmation is made in his own or in anothers right, or at least he must have the possession of the thing whereof the Confirmation is to be made, that may be as a foundation for the Confirmation to work upon. As if Feoffee on condition make a Feoffment over, and the Feoffor confirm his estate to him to whom the second

1. To confirm or alter the quality of the estate of him to whom it is made.

Feoffment

Co. Supp.
Lit. 300.
301.
Co. 10. 62.
5. 3. Dier.
145. 273.
349. 374.
339. 61.

Co. 10. 62.

Dier 52.
Stat. 13. 81.
ch. 20.

Co. 1. 117.

Co. 2. 369.
Dier 277.
Dier 377.
lat Bro.
203. Kelw.
145. 188.

Co. 1. 146.
2. 142.
711. 67.

Feoffment is made and his Heirs, this is a good Confirmation to make
 his estate absolute. And if Lessee for life make a Feoffment in Fee, or
 Lease for years, and the first Lessor confirm this second estate, it
 seems this is a good Confirmation. And if one disseise me of land,
 I may after confirm the estate of the Disseisor, or of his Heir if he
 be dead, or of his Feoffee if he have aliened it, and this will make
 his estate good for ever: And if the Disseisor make a Lease for life,
 or years of it, I may confirm the estate of the Lessee, and this will
 make it good for the time. * And if one make a Lease for life abso-
 lute, or a Feoffment in Fee, or Lease for life on condition, or be dis-
 seised of land, and the Lessee for life, Feoffee or Disseisor, doth grant
 a rent out of the land in Fee, and the Lessor, Feoffor, or Disseisee doth
 confirm the estate of the Grantee; this doth make good the grant
 for ever. And so also if the Heir of a Disseisor that is in by descent
 grant a rent-charge, and the Disseisee confirmeth it; this is a good
 Confirmation. And if an Infant make a Lease for twenty years, and
 the Lessee doth make a Lease to another for all or part of the time,
 and the Infant at his full age doth confirm this second Lease, this is a
 good Confirmation and doth perfect the Lease, for it is a rule, That
 which I may defeat by my entry, I may confirm by my Deed. But if
 there be no precedent estate on which the Confirmation may work,
 or the estate be such an estate as is meerly void, then is the Confir-
 mation void, and cannot take effect as a Confirmation; as for example,
 If a man assign dower to a woman that hath nothing to do with it,
 or a Court that hath not power doth make Leases by commission, or
 an estate that was upon condition is avoided by entry, or a Lessee
 surrender, or a Disseisee enter upon a Disseisor, and afterwards he
 that hath the rightful estate confirm their estates so defeated and
 gone; these Confirmations are void: *Debile fundamentum fallis opus*.
 And a Confirmation to him that hath nothing in the land is void.
 And hence it is that if one confirm all his estate that he hath grant-
 ed to another, when in truth he hath granted none at all, this is void.
 And so also if it is there be an estate and no possession: as if a Dis-
 seisor make a Lease for years to begin at *Michaelmas*, and before
 the day the Disseisee doth confirm the estate of the Lessee for years;
 it is said this is not a good Confirmation, *sed quare*. 3. The Con-
 firmor must have such an estate and property in the thing whereof
 the Confirmation is made, as he may be thereby imbled to confirm
 the estate to the Confirmee, as the Lessors, Feoffors, and Disseisees
 in the cases before have, otherwise the Confirmation is void: And
 therefore if the Heir of the Disseisee during the life of the Disseisee
 confirm to the Disseisor, this is no good Confirmation to perfect
 his estate, albeit the Disseisee die, and the right of the land descend to
 his Heir afterwards. So if land be given to *A* and *B* his Wife, and the
 Heirs of their bodies issuing, the remainder in fee to *A*, and *A* levy a

Fine

Fine with Proclamations and die, and she within five years doth enter and claim, and after the Comisee doth confirm the estate made by the first gift to the Wife To have and to hold according to the same; this Confirmation is to no purpose. So if Lessee for life make a Lease for thirty years, and after he in reversion and the Lessee for life lease for sixty years, in this case he cannot confirm the Lease for thirty years, because he hath granted it before for sixty years. And hence it is also that the Confirmation by one Joyntenant of the estate of his companion worketh nothing, for their estates are equal, and each hath interest in the whole land. And yet if one Joyntenant confirm the whole land to his companion

Joyntenants.

To have and to hold the land to him and his Heirs; this shall amount to a Grant, and so will be good to pass his moiety. And hence it is also that if a man grant a rent-charge out of his land to another for life, and then confirm his estate without any clause of distress (for by a clause of distress a grant of a new rent may be made) To have and to hold to him in Fee simple, or Fee tail; that this is void, for the Confirmor hath no reversion of the rent in him. 4. The precedent estate must continue until the Confirmation come, as in all the cases of voidable estates made, the confirmation must be before the estates be made void by entry, &c. or otherwise the Confirmation will be void. And therefore if Lessee for life or years surrender, or the Disseisee enter upon the Disseisor, and after the Lessor or the Disseisee confirm the estate of the Lessee or Disseisor; this Confirmation comes too late. 5. The estate precedent, and that which is to be confirmed, must be lawful and not prohibited by any Act of Parliament. And therefore if a spiritual person, as Prebend, or the like, make a Lease not warranted by the Statutes; the Confirmation of the Dean and Chapter will not help nor amend it. And if Tenant in tail make a voidable Lease, and after confirm it himself, this is voidable still. 6. There must be apt words of Confirmation in the Deed or Instrument. And herein note that albeit the words *Confirmavi*, *ratificasse*, & *approbasse* be the most significant and proper words to make this conveyance, yet such as are made by other general words may make a good Confirmation. And therefore it is agreed, that a Deed made by the words *Dedi*, *Concessi* or *Demisi*, may make a good Confirmation. And therefore that if the Disseisee, Coparcenor, or Lessor, make a Deed of the land by the word *Dedi* or *Concessi* to the Disseisor, other Coparcenor, or Lessee for life, and deliver the Deed; this is a good Confirmation without livery of seisin. Also if a Feoffment be made to A to the use of B. and his Heirs upon condition, and before the condition broken, the Feoffor and B do joyn in the grant of a rent-charge, and after the condition is broken; in this case the law doth interpret this a good grant from B. and a good Confirmation of the

Co. super
Lit. 295.

Fitz Con-
firmation
25.
Lit. Secd.
523.
Dier 263.

Lit. Secd.
543.
Co. super
Lit. 304.

Co. 5. 34.
Lit. Secd.
607.

Lit. Secd.
531, 532.
20 E. 4. 3.
Co. super
Lit. 295.
Dier 116.
Co. 2. 142.
5. 15.

Livery of sei-
sin.

the Feoffor without any words of Confirmation. So if Tenant for life do grant a rent to him in reversion, and he by Deed doth grant it to another and his Heirs in Fee; in this case the law doth construe this a good Grant and a Confirmation also. And in these cases of Confirmations of estates, if it be by the Disfeisee to the Disfeisor, it is good without any words of Heirs, as if the Disfeisee confirm the estate of the Disfeisor, or confirm the land unto him, and say not to him and his Heirs; this is an effectual Confirmation to him and his Heirs for ever. And if a Lessee for life or a Disfeisor make a Lease for life, or years, &c. and he in the reversion, or the Disfeisee confirm their estates, and not the land, and without any *Habendum* or limitation of estate, this is good for so long as the estates do continue. But it is most safe always to express the estate, i. to say To have and to hold the land to him and his Heirs, or for life, &c. as the agreement is. If Lessee for life grant a rent to one and his Heirs out of the land, and the Lessor doth confirm the estate, or this rent-charge, this doth make the estate of the rent sure. And so also if he do confirm the rent, and say, To have and to hold to him and his Heirs; this is a good Confirmation. But if he confirm the rent, To have and to hold to him in Fee, without naming his Heirs, hereby his estate is not bettered.

If the Lessor confirm the estate of his Lessee for life with this clause To hold without impeachment of waste; this is a good Confirmation to change the quality of the estate, so far as to make it dispunishable of waste. So if the Lord paramount confirm the estate of the Mesn with clause of acquittal. And so if Lessee for years, or for another's life be without impeachment of waste, and the Lessor confirm to him for his own life, and omit that clause; hereby this privilege is gone, and the estate is become punishable for the waste.

This kind of Confirmation *Presens*, must have all the qualities of the former: and there must be also in this case a privity between the Confirmor and the Confirmeer. And then it may enlarge the estate of him to whom it is made, as from an estate at will to an estate for years, or to a greater estate; from an estate for years, to an estate for life, or to a greater estate; from an estate for life, to an estate in tail, or in fee; and from an estate tail, to an estate in fee; and these Confirmations are good. But in all these kinds of Confirmations, care must be had of the manner of penning them, and that in every such Deed there be a limitation of the estate; that these words be inserted To have and to hold the Tenements, &c. to him and his Heirs, or to him and the Heirs of his body, or to him for term of life or years, as the agreement is; for if Lessee for life make a Lease for years, and then Lessee for life and he in reversion, confirm the land To have and to hold to him for life, or to him and his Heirs; these words will make the estate to encrease. But

2. To enlarge the estate of him to whom it is made.

Lit. Sect.
319.
Co. Super
Dier. 296.

Co. 1. 147.

Co. 9. 139.
F.N. B.
116.
Co. 8. 76.
Dier. 10.

Co. 9. 143.
Super Lit.
305.
Dier. 145,
356.
Co. 6. 16.
Lit. Sect.
333, 332,
339.
Dier. 263.

if the Confirmation be made to the Lessee for life or for years of his term or estate, and not of the land. As when he doth confirm his estate To have and to hold his estate to him and his heirs, this doth not increase the estate. And yet if he confirm the land To have and to hold the land to him and his Heirs; this will increase the estate.
Et sic de similibus.

If the Husband have an estate of land for life or years in the right of his Wife, or to them both for life, and a Confirmation to him alone, of his estate, or of the land To have and to hold the land to him and his Heirs; this is a good conveyance of the Fee simple to him after the death of his Wife. And if I let land to a woman sole for the term of her life, who taketh a Husband, and after I do confirm the estate of the Husband and Wife To have and to hold for term of their two lives; this is good, but it shall enure only to enlarge his estate for term of his life if he survive his Wife. But if one lease to another for life, and after confirm the estate of the Lessee to him and his Wife for term of their two lives; this is void as to his Wife.

If one grant a rent-charge out of his land for life, and after the Grantor confirm the estate of the Grantee in the rent without any clause of distress To have and to hold to him in Fee simple or Fee tail; this Confirmation is not effectual to enlarge the estate. But if a man be seised of an old rent-charge or rent-service, and grant the same first for life, and after confirm the estate of the Grantee in Fee simple or Fee tail; this is good, and will enlarge the estate accordingly.

If Tenant for life grant a rent out of the land to one and his Heirs during the life of the Lessee for life, and after the Lessor confirm the Rent to the Grantee and his Heirs; it seems the estate is not hereby enlarged, but when the Tenant for life doth die, the rent shall cease.

This kind of Confirmation may be made by the same words as the former, viz. by the words Give, Grant, or Demise. But neither of these may be made by the words Surrender, Release, Exchange, or the like. For these are peculiar words destined to a special end, being proper and peculiar manner of Conveyances. And yet if I that am a Lessor do say to my Lessee for years by my Deed, I will that you shall hold the land for your life; this is a good Confirmation to encrease the estate by this word *Vol* only. So I grant to my Lessee for years, that he shall hold the land for term of his life, this without any other words is a good Confirmation.

By a Confirmation the Lord may confirm the estate of his Tenant which holdeth by Knights service to hold in Socage, or to hold for a lease rent, or to hold as Common law where before he did hold in ancient Demesne, and such a Confirmation is good. But such a Confirmation

g. To diminish or abridge the services, &c.

Lit. 288.
524, 545.
Plow. 340

Co. super
Lit. 299.
Plow. 360.
Lit. 288.
525. Fitz.
confirmation,
9, 13.

Lit. 60.
543, 549.

Co. 1, 115.

Co. super
Lit. 298.
Fitz. Con-
firmation
21.

Co. 128.
Lit. 288.
538.

firmation as is to hold by new services, as a rose for money, or the like, is not good for that purpose. And in this case there must be also a privity. And therefore if there be Lord, Mesn, and Tenant, and the Lord confirm the estate of the Tenant to hold by less services; this is void. And if the Lord confirm to his Tenant after he is disfeised before his entry, to hold by less services; this is void.

A Confirmation may be by ap words in case of a Lease for years for part of the time, but in case of a Freehold it cannot be so. And so also it may extend to part of the thing before in estate. And therefore if a Disseisor, Tenant in tail, Husband of the land he hath in the right of his Wife, or Lessee for life make a Lease for years; and the Disseisor, Issue in tail, Wife, or Lessor make a Confirmation of all the land for part of the time, or of part of the land for all the time: this Confirmation is good. But if any such person make a Lease for life, Gift in tail, &c. the Disseisor cannot confirm part of the estate but he must confirm all. And therefore if he confirm his estate for one hour, it is a Confirmation of the whole estate. And so also if he confirm the land to the Disseisor himself but one hour, one week, one year, or for his life, &c. this is a good Confirmation of the estate for ever. And if it be a Lease for years that is confirmed, care must be had to the manner of the Confirmation, for if the Confirmation be of the estate or the term for one hour; this is a good Confirmation for the whole time: and therefore the Confirmation must be had of the land, to have and to hold for part of the term; and being so made it may be good for that time onely, and no longer.

If I make Feoffment on condition, and before the condition broken I confirm the estate of the Feoffee absolutely, this will not extinguish the condition. And yet if the condition be broken first, so as my entry is lawful; in this case the Confirmation will extinguish the condition. And if the Feoffee make a Feoffment over absolutely to another, and I confirm the estate of the second Feoffee whether it be before or after the condition broken; by this the condition is discharged.

If the Lord confirm the estate of his Tenant in the tenements, or one that hath a rent, common, or profit out of land confirm to the terretenant his estate; in these cases notwithstanding this Confirmation the seignior, rent, common, &c. do continue, and this shall not enure to extinguish it.

If the Disseisor and a stranger disseise the Heir of the Disseisor, and the Disseisor confirm the estate of his companion; this shall not enure to extinguish the suspended right of the Disseisor, but when the Heir of the Disseisor shall reenter it shall be revived. And if the Grantee of a rent charge, and a stranger disseise the Tenant of the land, and the Grantee confirm the estate of his companion;

6. Where a Confirmation may be good for part of the estate, or for part of the thing. Or not.

7. The force and verue of it. And how it shal enure and be construed, and taken.

Co. 5. 81,
82.
Lit. Sect.
5. 19.
Co. super
Lit. 297.
Lit. Sect.
530.

Will. 29.
Co. 1. 14.
224.

4th Sect.
535 536
537.

Co. super
Lit. 296.

this.

this shall not enure to the rent suspended to extinguish it, but after the re-entry of the Tenant, the rent shall be revived.

If a man hold his land of me by Knights service, rent, suit of court &c. and I confirm his estate to hold of me by Knights service only, for all manner of services and demands; in this case albeit this do abridge the service, yet it shall not be construed to take away wardship, relief, and to marry my Daughter, and make my Son Knight, and the like.

Co. super
Lit. 309.

If I have an estate in land for my life, and he in reversion doth confirm the estate to me and my Wife for the term of our lives; this shall enure only as a Confirmation of my estate, and not so as to give any estate to my Wife. But if I have a Lease for life or years in right of my Wife, and he in the reversion do confirm the estate to me and my Wife, To have and to hold to us for our lives; this shall enure not onely to confirm the estate, but also to create an estate to me after my Wives death: And in the case of a Lease for years, it maketh our estate joynt; but in the case of a Lease for life, I shall take by way of enlargement of estate for my life after my Wives death. And if in this case the Confirmation be to me and my Wife, To have and to hold the land to us two and our Heirs; this shall enure to us in Fee simple as Joyntenants. If land be let to Husband and Wife, to have and to hold the one moiety to the Husband for his life, and the other moiety to the Wife for her life, and the Lessor confirm to them both their estate in the land, To have and to hold to them and their Heirs; In this case as to the one moiety, it doth enure only to the Husband and his Heirs but as to the other moiety they shall be Joyntenants. And yet if such a Lease for life be made to two men by several moities, and the Lessor confirm their estates in the land, To have and to hold to them and their Heirs; by this they are Tenants in common of the inheritance.

See before

Co. super
Lit. 309.

If the Disseisee confirm the estate of the Disseisor, To have and to hold to him and his Heirs of his body engendred, or To have and to hold to him for term of his life; this shall enure to him as a Fee simple, and shall confirm his estate for ever.

Lit. Sect.
419.

If my Disseisor make a lease for life, the remainder over in Fee, and I confirm the estate of the Tenant for life; this shall not enure to, nor avail him in remainder. And if the Disseisor make a gift in tail, the remainder to the right Heirs of the Tenant in tail; and the Disseisee confirm the estate of the Tenant in tail; this shall not extend to the Fee simple, no more then if the Disseisor make a gift in tail, the remainder for life, the remainder to the right Heirs of the Tenant in tail; and the Disseisee confirm the estate of the Tenant in tail; for this shall extend onely to the estate tail, and not to the remainder for life or in Fee. But if the Disseisee in the first case confirm the estate of him in the remainder; this shall enure

Co. super
L. 3. 298.
297.

to the Lessee and his Heirs for ever : by this the Lessee hath only an estate for term of the life of the Tenant in tail, or for life, and therein his Lease for years is extinct.

If Tenant for life doth grant a rent to another and his Heirs during the life of the Tenant for life, and the Lessor confirm to the Grantee and his Heirs, this shall be construed to be an estate for life only, and no enlargement of the estate. But if Tenant for life grant a rent charge in Fee, and the Lessor confirm it, this shall be construed to be a confirmation of the Fee simple.

See more in *Exposition of Deeds, cap. 5. in toto*. And more also in the Chapter of *Release*, whereunto we are now come in the next place.

Co. L. 117.
super Lib.
401.

CHAP. XIX.

Of a Release:

1. Release.
Reid.

A Release is the giving or discharging of the right or action which a man hath or may have or claim against another man or that which is his. Or it is the conveyance of a mans interest or right which he hath unto a thing to another that hath the possession thereof or some estate therein. And this albeit may be made by other words, as *Dedi, Concessi, or Remunsi*, or such like, yet it is most commonly and properly made by these words, *Remissi, Relaxasse, & quietum clamasse*, all which are much to one purpose. He that makes the Release is sometimes called the Releffor, and he to whom it is made, the Relessee.

Terms of
the Law.
Web.
Synb. Lib.
184. 46.

Releffor.
Relessee.
2. Quotuplex.

There are two kinds of Releases like unto these of Confirmation viz. a Release expressed or in Deed, and that is a purposed Release when the act done, or Deed made, is intended a Release. And this is always done by writing. And then it is defined by some to be an instrument whereby estates, rights, titles, actions and other things be sometimes extinguished, sometimes transferred, sometimes abridged and sometimes enlarged, which is after this manner, *Neverius, &c. me A de B remisit, relaxasse & omnino de me [vel pro me] & hered. meis quietum clamasse C de D totum jura, titulum & clameum que habui, habeo vel quovismodo in futuro habere potero de & in uno mesuagio cum pertin. in E, &c.* And a Release implied or in Law, and that is when the law by intendment and construction, and by way of consequent doth make a Release of an act done to another purpose.

Co. Litt. 346.
a66.

And

And this is sometimes by writing, sometimes without writing. These Releases also are sometimes of a bare and naked right, and sometimes of a right accompanied with some estate or interest, and sometimes they are of Actions real or in lands or tenements, and sometimes of Actions personal, of, or in goods or chattels, and sometimes of Actions mixt, partly in the reality, and partly in the personality.

A Release is much of the nature of a Confirmation, for in most things they agree and produce the like effects. This therefore is said sometimes to enure by way of *mitter le estat*, i. by way of giving, or transferring, or enlargement of an estate or interest, and so doth give some new interest or estate to him to whom it is made. And sometimes it is said to enure by way of *mitter le droit* onely, i. by way of giving, transferring and discharging of a right, title or entry unto him to whom it is made. And so it doth sometimes perfect an estate that was imperfect and defeasible before, and enure by way of entry and Feoffment. And sometimes also it doth enure to make a conditional estate absolute. And sometimes also it doth work and enure by way of extinguishment or discharge: And then also sometimes it doth enure by way of discharge or extinguishment, as against all persons, and so as that whereof all persons may take advantage. And sometimes it doth enure onely as a discharge against some persons onely, and as to or against other persons by way of *Mitter le droit*. And some of these in Deed enure by way of extinguishment, for that he to whom the Release is made cannot have the thing released. And some of them have some quality of such Releases, and are said to enure by way of extinguishment, but in truth do not, for that he to whom the Release is made may receive and take the thing released. And in some cases also a Release like a Confirmation doth enure by way of abridgement. But a man cannot bar himself hereby of a right that shall come to him hereafter. And therefore it is held that these words used in Releases [*Quaquevis modo in futurum habere poterit*] are to no purpose.

3. The nature and operation of it in general

Lands, Tenements and Hereditaments themselves may be given and transferred by way of Release, and all rights and titles to lands may be given, barred and discharged by Release, and so also may rights and titles to goods and chattels. Also all Actions real, personal and mixt, may be given, discharged or extinct by Release: for howsoever rights and titles of entry cannot be granted by act of the party, nor any action may be granted from one man to another by act of the law or the party, yet all these may be released to the terretenant. And a right to a

4. What things may be released. Or not. And how.

Co. Supr.
Lit. 195.
373, 377.
Co. 1. 147.
Lit. Sect.
606. 455.
465, 466.
468.

Co. 10. 48.
Super Lit.
268, 269.
266.

Freehold or inheritance, Seigniorie or rent *in present* or *future* may be released five manner of ways, and the first three ways without any privity at all. 1. To the Tenant of the Freehold in Deed or in Law. 2. To him in the remainder. 3. To him in reversion. The other two ways in respect of privity without any estate or right, as by Demandant to Couchée, Donor to Donee, after the Donee hath discontinued.

OTHERS SAY
THAT THE
TENANT OF THE
REMAINDER
MAY RELEASE

Also Conditions annexed to estates, powers of revocation of uses, Warranties, Covenants, Tenures, Services, Rents, Commons, and other profits to be taken out of lands, may be discharged, extinguished and determined by release to the Tenant of the land, &c.

Bro. Re-
lease in
toto.

Also possibilities of land, &c. if they be near and common possibilities, albeit they be not grantable over to another person, yet may they be released to him that hath the present estate of the land. And therefore if a man possessed of a term devise it to *A* for life, the remainder to *B* and his Heirs makes during the term; in this case albeit *B* may not grant his interest over, yet he may release to *A*. And if *A* devise to *B* twenty pound when he comes to the age of twenty four years, and die, in this case *B* after he is of the age of twenty one years may release this Legacy.

Co 10 47
51 51.
5. 70. 91.
Super Lii.
265.
Co. 1. 311.
Dier 19.
Co. 1. 113.
174.

So a Covenant to do a future act may be released before it be broken. And it seems also the Conusee of a Statute or Recognisance may release to a Feoffee of part of the land, and so bar himself of the execution of that land. And if I grant to *I S* that if he do such a thing he shall have an annuity of twenty pound during life; in this case it seems *I S* may release this before the Condition be performed.

And if I make a Feoffment to *I S* to divers uses with power to revoke it; I may release this power to one that hath an estate of Freehold in possession, reversion or remainder in the land. And yet if I make a Feoffment to *I S* with proviso, that if *B* revoke that the uses shall cease; in this case *B* cannot release this power. And a remote possibility that is altogether incertain, cannot be released. And therefore if the Son of the Disseisee release to the Disseisor in the life time of his Father, this Release is void. And so if the Conusee of a Statute release his right to the land of the Conuor before execution; this Release is void. And so if a Plaintiff release to a Bayl in the Kings Bench before Judgement given, this Release is void.

So if one promise to pay me ten pound upon the surrender of my land to him, and that if he shall sell it for above fifty pound, that then he shall pay me ten pound more, and I release this to him before he do sell it, and before I do surrender; in this case this doth not release the second promise, because it is not releasable.

Advocate
Tr. 14. 11.
B. R.

Also

See infra.

Also Debts, Legacies, and other duties may be released and discharged thereby, before or after they become due. And therefore a rent or annuity may be released before the day of payment, and so also may a debt due by Obligation: Judgments, Executions, Recognisances, and the like, by apt words be discharged by Release.

If the Charge or Duty grow by record, the Discharge and Release thereof must be by record also. And if it grow by writing, the Discharge and Release must be by writing also. *Nihil est magis rationi consentaneum quam eodem modo quodque dissolvere quo constitutum est.* And therefore a duty growing by a verbal agreement may in some cases be released by words without writing. But regularly Lands and Tenements cannot be given, nor Rights and Titles to Lands, and Actions be discharged by Release without a Deed in writing.

5. How and after what manner these things may be released.

Co. Super
Lit. 274.
Perk. Sect.
718.
Lit. 467.
Co. 1. 111.
4th. 7. 21.

A Release that doth enure by way of *mitter le estat*, *mitter le droit*, or extinguishment, may be made upon condition, or with a defeasance, so as the condition or defeasance be contained in the Release, or delivered at the same time with it: for no defeasance made after can avoid the force of a Release made before. And yet a Release may be delivered as an escrow, and so the force of it may be suspended for a time. But a Release of a condition may not be made upon a condition. Nor may a Release of a Chattel be upon a condition subsequent, but it may be upon a condition precedent.

Condition.
Defeasance.

Curia B. R.
Mil. 9. Car.
Barb. &
Perk. case
Dier 307.
4th. 7. 24.
Co. Super
Lit. 274.
Lit. Sect.
467.

And therefore if a man release a Debt to another upon condition that the Releffor may have such a debt owing from a third person to the Releasee; this is a good condition.

A Release of all Actions may be made until a time past, as until the first of May last, or until the day of the date of the Release: and this will discharge all Actions till then, and none after. But a Release cannot be made of a right or action for a part of an estate, or for a time only, as for one year, or until Michaelmas next, or the like, for a Release of such a thing for one day, or for one hour, is a Release of it for ever. And yet a man may release his right in a part of the land. And therefore if a man be disseised of two acres, he may release his right in one of them and enter into the other acre. Also a Release in the nature of an Acquittance may be of part of a Debt. And therefore if one be bound in an Obligation of Four hundred pound to pay two hundred pound at Michaelmas, and at Christmas, after the Oblige by his Deed releaseth Three hundred ninety pound parcel of the said Four hundred pound: this is a good Release for so much and no more.

Adjudged
Barkley &
Perk. case
Mil. 9. Car.
B. R.

* 6. What Releases may be made of lands or tenements. And what shall be said a good Release in Deed. Or not. And by what words it may be made.

* In every good Release in Deed, howsoever it enure, these things are requisite. 1. That there be a good Releffor and a good Releasee, and a thing to be released. 2. That the Deed be well sealed,

1. When it enures by way of enlargement or passing of an estate.

1 In respect of
the estate of
the Releasor.

Per Justice
Jones, 5
Car. Dier
Idem.

Surrender.

2 In respect of
the estate of
him to whom
the Release is
made.

Ad Judge
Trin. 5 Jac
B. R. But
lers case.

led, delivered. And if it tend and enure by way of enlarge-
ment of estate, then these things are further required to make the
Release good. To the what doth make the Release must have
such an estate in himself, as out of which such an estate may be
derived and granted to the Releasee, as is intended by the Release:
As if he have the reversion in freehold lands, he may release to a Ten-
ant for years, and thereby encrease his estate to an estate for life
or in tail, or he may pass his whole fee simple by the Release. But
if there be Lessee for years, rendering rent, and the reversion is granted
for life, the remainder over in fee, and the Grantee of the rever-
sion release all his right to him in remainder, and then he in the re-
mainder grant the reversion, and the Tenant for life release to the
Grantee as above. In this case it seems both these Releases are void,
and cannot enure as Releases, howbeit it may be if they have words
of surrender in them, they may enure as Surrenders. So if there
be Lessee for years, the remainder in tail, the remainder in fee,
and the Lessee for years being a woman, doth marry with him in
the remainder in fee, and he in remainder in tail release to him in
remainder in fee, this is a void Release. So if Tenant for life re-
lease to him in remainder in fee or in tail, it seems this is void, and
cannot enure as a Release. So if there be Tenant for life, the re-
mainder in tail, the remainder in fee, and he in remainder in fee,
release to the Tenant for life, this will not encrease his estate. And
if the Tenant in tail in this case release to the Tenant for life, his
estate shall be no longer increased hereby then for the life of the
Tenant in tail.

2. He to whom the Release is made must have some estate in pos-
session in Deed or in Law, or in reversion in Deed, in his own or an-
others right of the lands whereof the Release is made to be as a founda-
tion for the Release to stand upon: For a Release which must en-
ure to enlarge an estate, cannot work without a possession joyned
with an estate. And therefore the Releasee must be Lessee for life,
years, or Tenant by Statute Merchant, Staple, elec. it, or as Guardian
in chivalry that doth hold the land over for the value, or at least he
must be Tenant at will. And therefore if a man let his land to ano-
ther for term of years, to begin presently, and after the Lessor or his
Heir doth release to the Lessee (after his entry, and being in posses-
sion) all his right in the land, this is good to enlarge the estate
according to the time set down in the Release: But if the Release
be before the term begin, or after the term begin, and before the
Lessee have entered, (howsoever if any rent be reserved on the Lease
it may enure and be good to extinguish that rent) yet it is not
good to enlarge the estate. And yet if a Tenant for twenty years
in possession make a Lease to B for ten years, and B enter, and he
in the reversion release to the first Lessee for years, this is a good

Release

Dier 296

Per Justice
Jones, 5
Car. Dier
Idem.

Ad Judge
Trin. 5 Jac
B. R. But
lers case.

Lit. sed.
5 8
Plow. 556
Co. Super
Lit. 346

Co. Super
Lit. 270
273. 164

Lit. sed.
459
Plow. 473
Dier 4
15 H. 7. 14.

Release to enlarge the estate. So if a man make a Lease for years the remainder for life or years, and the first Lessee doth enter, in this case a Release to him in remainder is good to enlarge the estate. So if I grant the reversion of my Tenant for life to another for life, and after release to him and his Heirs, this is a good Release to enlarge the estate.

Co. super
lit. 273.

So if a man make a Lease for life or years to a feme sole, and she take a Husband, and he in the reversion release to the Husband and his Heirs, this is a good Release to enlarge the estate according to the words of the Release. But if the case be so, that a man had an estate in possession of land, and he be now out of the possession of it, and have but a right onely to it, or if he have a possession onely and no estate, or if he have neither estate nor possession; in these cases a Release made to such a one will not avail to enlarge his estate.

Co. super
lit. 270.

lit. Sect.
431.

And therefore, if a man make a Lease for life, the remainder for life, and the first Lessee die, and the Lessor release to him in remainder for life, before his entry, this is a good Release to enlarge his estate, for he hath an estate of Freehold in law, capable of enlargement by Release before entry. But if there be Lessee for life, the remainder for life, the remainder in tail, the remainder in fee, and the Lessee for life is disseised, and during the possession of the Disseisor he that hath right doth release to one of them in the remainder, this is void. So if lands be given in tail, or leased for life, and the Donee or Lessee is disseised, and during the possession of the Disseisor, the Donor or Lessor doth release all his right to the Donee or Lessee, this is void, and will not enlarge his estate, howbeit if there be any rent reserved on the estate, it will extinguish the rent: So if the Tenant by the curtesie grant over his estate, and after he in reversion doth release to the Tenant by the curtesie, in this case his Release is void, and will not enlarge his estate: So if an Infant make a Lease for life, and the Lessee granteth the estate over with Warranty, and the Infant at full age doth bring a *Dum suis infra aetatem*, and the Tenant doth vouch the Grantor, who doth enter into the Warranty, and the Demandant being the Infant, doth release to him and his Heirs, this will not enlarge his estate, for in truth he had no estate before, and that which is not cannot be enlarged. And if Lessee

lit. Sect.
435, 436.

Co. super
lit. 273.

Dier 258.

Co. super,
lit. 271,
lit. Sect.
461.

for life or years, release to him in remainder or reversion: this cannot be good as a Release, howbeit if there be apt words, it may amount to a Surrender. And if a man have onely an occupation of land as Tenant at sufferance, as when a Lessee for years doth hold over his term, or the like, no Release to him can work any enlargement of estate, for albeit he have a possession, yet hath he no estate, and besides in this case there is no privity: which

3. In respect of
privy.

which is the third thing required in these Releases. For as in all these Releases that enure by way of encrease or passing an estate, there must be some estate in the Releasor and the Releasee, so there must be some privy in estate between them at the time of the Release made, for an estate without privy is not sufficient. And therefore it must be, between Donor and Donee, Lessor and Lessee, and the like, as in the cases before, between him in the reversion and the Lessee for life or years, tenant by Statute Merchant or Staple, or by Elegit, or Guardian in Chivalry, that keepeth the land for the value. And if Tenant for life lease for years, and he in the reversion, and the Tenant for life do joyn together and release to the Lessee for years, this is a good Release to enlarge the estate. So if he in reversion release to the Husband that hath an estate in the right of his Wife onely for life or years, this is a good Release. So if Lessee for years make a Lease of the land but for part of the term, the privy continueth still, and therefore a Release to him is good to enlarge the estate. But if he assign over all the term, then the privy is gone, and therefore a Release made to him afterwards is void: and then a Release made to the Assignee of the term is good to enlarge the estate. And if a Disseisor make a Lease for life or years, and after he and the Disseisee joyn together to make a Release to the Lessee for life or years, this is a good Release to enlarge the estate. But if the Disseisor in this case make a Lease for life or years, and the Disseisee or he that hath right release to the Tenant for life or years, in this case the Release is void for want of privy. And if there be Lessee for years the remainder for life, and he in reversion release to the Lessee for years or him in remainder for life, and his Heirs all his right, this is a good Release to work an enlargement of estate. So if one make a Lease for life, and grant the reversion for life, and then the Lessor doth release to the Grantee of the reversion and his Heirs, this is a good Release to enlarge the estate of the Grantee, and here is privy enough. If *A* be Tenant for life, the remainder to *B* in tail, the remainder to *C* for life, the remainder to *A* in fee, and *A* die, and his Heir doth release all his right to *B* being in possession, this is a good Release, and gives the fee simple.

But if *A* make a Lease to *B* for life, and the Lessee maketh a Lease for years, and after *A* in the life time of the Tenant for life maketh a Release to the Lessee for years, this Release is void and will not enlarge his estate for want of privy. So if a man make a Lease for twenty years, and the Lessee make a Lease for ten years, and the first Lessor doth release to the second Lessee and his Heirs, this Release is void. So also if the Donee in tail make a Lease for his own life, and the Donor release to the Lessee and his Heirs: this Release

Co. super
Lit. 296.
Lit. Sect.
461.

Plow. 541

Co. super
Lit. 273.

Dier 4.
Co. 3. 22.

Plow. 510.
14 H. 7. 4.
Lit. Sect.
518.

Co. super
Lit. 271.

Bro. Re-
lease 74.

Co. super
Lit. 271.
Lit. Sect.
516.

is void. So also if the Donee in tail make a Lease for his own life, and after the Donor release to the Donee and his Heirs, it seems this is not a good release. Also one Joyntenant or Coparcener may release to another, and thereby transfer all his estate and give the whole interest unto his companion, and this is a good Release to pass all his or her part of the land. And if there be three Joyntnants in Fee, and they make a Lease for life, and after two of them release all their right in the land to the third, this is a good Release. So if one make a Lease for life to another, and after he grant the reversion to seven, and the Tenant for life doth attorn, and after four of the seven release all their right to the other three, and after one of the three release to the other two, these are good Releases. So if a Lease for years be made to two, to begin at a day to come, a release by one of them to the other is good to give all the term and all the land to the Releasee. But it seems one Tenant in common cannot release to another Tenant in common.

Bro. Release 77.
Perk. 22d.
84.

to H. 4. 3.

Co. super
Lit. 273,
401.

9 H. 6. 31.
Dier 116.
Lib. Sect.
544.
Co. super
Lit. 264.
Dier 107.
Co 9 52.

Co. super
Lit. 273.
Lit. Sect.
465, 468,
469.

The fourth thing that is required in such a Release is, sufficient words in law not onely to make a Release (which is required in all releases) but also to raise and create a new estate. For this therefore know, that all Releases (of what kind soever) are commonly made by these words, *Remissa, Relaxasse, & quietum clamasse*, as being the most ancient and significant words to this purpose. And amongst these the words *Release* is the most effectual word, as that which doth include the other two, and as that which is the proper and peculiar word for this kinde of conveyance. But there are other words also by which a Release may be made, as *Renunciare, Acquiescere, &c.* And therefore it is held that if one have common in another's land, and he by Deed release it to him thus, *Renuncio communiam meam, &c.* this is a good Release. And if the Lessor do but grant to his Lessee for life that he shall be discharged of the rent, this is a good Release of the rent. And it is a rule, That by what words a debt or duty may be created, by words of a contrary signification it may be released. And therefore if one do knowledge himself to be satisfied and discharged a debt, this is a good Release of the debt. And for words to raise the estate, it is usual and most safe to specify in the Deed what estate he to whom the Release is made shall have, and in most cases this is needful. For it is generally true, That when a Release doth enure by way of enlargement of estate, no inheritance in Fee simple, or Fee tail can pass without apt words of inheritance. And therefore if I make a Lease of land to another for his life, and after I release to him all my right without more saying in the Release: hereby, his estate is not enlarged. But if I release to him and his Heirs, by this he hath a Fee simple.

4 In respect of the words whereby it is made.

And if I release to him and the Heirs of his body: by this he hath an estate tail. But where a Release worketh by way of *Mittor li offars*, there in some cases there needs not any words of inheritance, as in cases where Releases are made between Joyntenants and Coparcenors, as where a joynt estate is made to the Husband and Wife, and a third person and their Heirs, and the third person doth release all his right to the Husband alone, or the Wife alone.

So if there be three Joyntenants, and one of them doth release to one of the other two; in all these and such like cases there needs not any limitation of the estate, for the Release is good without it.

2. When it doth enure by way of passing and extinguishment of a right or title only.

1. In respect of the estate of the Releasee.

In every good Release in Dreed, that doth tend and enure to give discharge, or extinguish any right or title of lands, it is also further requisite.

1. That he that doth make it hath at the time of the Release made, some right or title to release. As where one doth disseise me of land, and I release to him all my right in the land; this is a good Release. So if one disseise my Tenant for life, and I (being the next in remainder or reversion in Fee) do release to him that did make the Disseisin, this is a good Release. So if the Husband make a Lease for life, and then take a Wife and dieth, and the Wife release her dower to him in reversion; this is a good Release. And so also if after the marriage a man make a Lease for life, the remainder in fee, and she release all her right to him in remainder in fee, or to him in reversion, this is a good Release, and will bar her for ever.

And therefore if the Releasee have onely a possibility of a right, or a right happen to come to him after the release, this is not sufficient to make the release good. And therefore if the Father be disseised, and the Son before his Fathers death release all his right to the Disseisor, and after the Father dieth, so that the right doth descend; this is no good Release to bar the Releasee of his right. So if there be Grandfather, Father and Son, and the Father disseise the Grandfather, and make a Feoffment, and the Son release in the life time of his Father, and after the Father and Grandfather die, this Release in this case will not bar him. So if a Lease be made for life, the remainder to the right Heirs of *FS*, and the Lessee is disseised, and the eldest Son of *FS* living, his Father doth release to the Disseisor, this Release is void. So if the Conusee of a Statute, &c. do release to the Conusor all his right in the land, this is void and he may sue execution after notwithstanding. Or if the Releasee have onely a power, this is not sufficient to make a Release good. And therefore if a man by his Will devise that his Executor shall sell his land, and dieth, and the Executors release all their right and title in the land to their Heirs, this is void.

Lit. Sed.
466.
Co. super
Lit. 265.
Co. 5. 70.
71. 1. 111.
8. 152.

Lit. Sed.
446. Co.
10. 47. 433.
Super Lit.
305.

Co. 10. 55.

Co. 5. 70.

Co. super
Lit. 265.

Co. super
lit. 107.

2. In all cases of a Release of a bare right of a Freehold in lands or tenements, he to whom the Release is made, must at the time of the making thereof in any case have the Freehold in Deed or in law in possession or some state in remainder or reversion in Deed (and not in right only) in Fee simple, Fee tail, or for life of the lands whereof the Release is made: For rights of Entry, and Actions, and the like, are not to be transferred to strangers, but are thus to be released, and such Releases are good. As if the Disfeisee release to the Disfeisor himself who hath the Freehold in Deed, or to the Heir of the Disfeisor before his entry, who hath the Freehold in Law, or to the Lessee for life of the Disfeisor: these Releases are good. So if a Disfeisor make a Lease to *A* and his Heirs during the life of *B*, and *A* die, and the Disfeisee release to his Heir before his entry, this is a good Release.

2. In respect of the estate of him to whom the Release is made.

Co. super
lit. 266.
293.
lit. sect.
448.
1 H. 6. 4.
Dier 307.

So if a Fine *sur consauance de droit enuues, &c.* or *sur consauance de droit* only (which is a Feoffment on record) be levied, or if Tenant for life by agreement of him in the reversion, surrender to him in the reversion, or if a man do bargain and sell his land by Deed indented and inrolled, or uses are raised by Covenant on good considerations, in all these cases the Conusee, him in reversion, Bargainee, and *cestui que use*, have a Freehold in law in them before entry. And therefore a Release to them of the right of the land by him that hath it is good, and will bar the Releffor. But otherwise it is in cases of Exchange, Partition, or upon Livery within the view, for in these cases no Release is good until an actual entry made, for till then they have neither Freehold in right nor law. So if a Disfeisor make a gift in tail, or Lease for life or years of the land, and keep the reversion, and then the Disfeisee or his Heir release to the Disfeisor all his right, this is a good Release to bar his right for ever. So if the Heir of the Disfeisor be disseised, and the first Disfeisee do after release to him all his right: this is a good Release to bar him. So if a Donee in tail discontinue in fee, and the Donor release to the Discontinue and die, this is a good Release against the Donor. So if the Donee in tail be disseised, and after the Donor release to the Donee all his right, this is good: but in this case nothing of the reversion will pass by the Release: for the Donee had then nothing but a right. But if any rent be reserved on the estate tail, the rent is gone by the Release. So if a Lease be made to one for life rendering rent, and the Lessee is disseised, and the Lessor release to the Releffor and his Heirs all his right: in this case albeit the rent be exacted, yet nothing of the right of the reversion doth pass. And yet if a woman that hath a right of dower release to the Guardian in Chivalry, this is a good Release, and her right or title of dower is gone. But if a Disfeisor make a Lease for years, and the

Extinguishment.

Disfeisee

Co. super
lit. 266.
lit. sect.
455, 456.

Disseisee release to the Lessee for years, this Release is void because he hath no Freehold. But if he make a Lease for life, and the Disseisee release to the Lessee for life, this is a good Release. So also a Release to the Disseisor after the Lease for years made, is good. And if Lessee for years be ousted, and he in the reversion disseised, and the Disseisor make a Lease for years, and the first Lessee release to him, this is a good Release. Also in some cases a Release made to one that hath neither Freehold in deed, nor Freehold in Law, is good when he hath an estate in reversion or remainder, as in the case before, where the Release is made by the Disseisee to the Disseisor after he hath made an estate for life. So if the Demandant in a real action release to the Tenant that comes in by receipt upon a prayer of aid, or voucher upon a Warranty, this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other besides the Demandant, it is void. So if the Tenant in a real action alien hanging the *precipe quod reddat* against him, and after alienation the Plaintiff release all his right in the land to him, this is a good Release. So if a Disseisor make a Lease for life, the remainder to another for life, the remainder to a third in tail, the remainder to a fourth in fee, and the Disseisee release to either of them in remainder, this is a good Release. But if in this case Tenant for life be disseised, and after he that hath right (the possession being in the Disseisor) doth release to either of them in remainder, this is a void Release. But in all the cases of a Release of a bare right to him that hath an estate of a Freehold in Deed or in Law, generally there needs no privity to make the Release good: as in the cases before of a Release made to the Tenant for life of the Disseisor, and them that follow. For if Tenant for life make a Lease to another for life of the Lessee, the remainder over in Fee, and the first Lessor release all his right to him to whom the Tenant made the Lease for life, this is a good Release and a perpetual Bar, albeit the Release be not to him and his Heirs. And so it is in case of a reversion.

3. In respect of
privity.

If Lessee for years be ousted, and he in the reversion disseised, and the Disseisor make a Lease for years, and the Lessee that is ousted doth Release to the Lessee or the Disseisor, this is a good Release. And yet if the Disseisee do release to the Lessee for years of the Disseisor, this is void.

If Lessee for a thousand years be ousted by the Lessor, and he make a Lease for two years, and the Lessee for a thousand years release unto him, this is a good Release. But if a Lessor disseise his Lessee for life, and make a Lease for a thousand years, and the Lessee for life release to this Lessee of a thousand years, this is void.

If one be disseised, and after another doth disseise him, and the Disseisee release to the last Disseisor, this is a good Release. So if a disseisee

Co. super
Lit. 165.

Lit. 162.
443, 149,
450, 551.
Co. 8, 151.

Co. super
Lit. 275.
Lit. 162.
470, 471.
Co. 10, 48.

Co. super
Lit. 377.
Lit. 162.
473, 479.
471, 474.

disseise *B*, who infeoffeth *C* with Warranty, who infeoffeth *D* with Warranty, and *E* disseiseth *D* to whom *B* the first Disseisee releaseth; this is a good Release, and doth defeat all the mean estates and warranties. So if my Disseisor lease for life, and the Lessee for life alien in Fee, and I release to the Alienee all my right, &c. this is a good Release, and will bar me of my entry: but if my entry be gone, as if I lease for life, and my Lessee be disseised, and that Disseisor is disseised, and I release to the second Disseisor; in this case the first Disseisor may enter upon the second. So if my Disseisor in the case aforesaid make a Lease for life, and the Lessee for life maketh a Feoffment to two, and I release to one of the Feoffees, this is a good Release, and will bar me and my Disseisor also. So if Tenant for life, let the land to another for the life of the Lessee, the remainder to another in fee, and the Lessor release to his Tenant for life, this is a good Release.

If one that hath a Son within age be disseised and die, and the Disseisor die seised, and the land descend to his Heir, and a stranger abate, to whom the son when he comes of age doth release; this is a good Release. So if one be disseised by an Infant which doth alien in fee; and the Alienee die seised, and his Heir entreth, the Disseisor being within age, and the Disseisee release to the Heir of the Alienee, this is a good Release. But where an inheritance or an estate for life is released to one that is but Tenant for years, the Release is not good without privity. And therefore if Tenant for life or in fee, release to the Lessee for years of his Disseisor, this is not good. But the Release of a term of years to the Lessee for years of him that doth eject him, is good enough without privity, as in the case before.

9 H. 6. 43.

Co. 10. 48.

Co. super
Lit. 265.

But here note, that in cases of a void Release of a right to an inheritance or Freehold, where there is a Warranty contained in the deed, the Warranty may be good, and be used by way of rebutter, albeit the Release be void. As if the Son of the Disseisee release with Warranty in the life time of his Father, or there be Grandfather, Father and Son, and the Father disseise the Grandfather, and make a Lease with warranty and die; in both these cases albeit the Son be not barred by the Release, yet he is barred by the Warranty.

Warranty.

Co. super
Lit. Sect.
469.

4. Such words as will make a good Release in the cases of Releases that enure by way of enlargement of estate, will make a good Release in these cases. And note that this kinde of Release is good without any limitation or specifying of the estate, for by a Release of all a mans right, without saying To have and to hold to him and his Heirs, &c. in all the cases before, he that makes the Release is barred of his right for ever, for if I be seised of an estate in fee by wrong, and he that hath right release to me all his right,

4. In respect of the words whereby it is made.

albeit:

albeit it be but for one hour, yet this is a good Release for ever.

7. What Releases may be made of other things. And what shall be said a good Release in Deed of such things. Or not. And by what words.

Of a feignory; rent-service common or the like.

If there be Lord and Tenant, and the Lord release to the Tenant all his right that he hath in the Seignory, or all his right that he hath in the land, &c. this is a good Release to extinguish the Seignory. And in this case there needs no words of inheritance or limitation, for by release of all the right in the Seignory, the same is extinct for ever, without saying [to him and his Heirs]. And yet in this case the Lord may by apt words release his Seignory to the Tenant onely in tail or for life, and it shall be good so long. But if a Lord grant to his Tenant that he shall do his suit to another Manor of the Lords, or that the Tenant shall give him yearly twelve pence for his suit: this grant will not extinguish and determine the services or tenure.

If there be Lord and Tenant, and Tenant be disseised, and after the Lord release all his right, &c. to the Tenant: by this Release the Service or Seignory is extinct: for albeit a right regularly cannot be released to him that hath but a bare right, yet a Seignory may be released and extinct to him that hath but a bare right in the land. But if the Tenant make a Feoffment in Fee, and then the Lord release all his right, &c. to the Tenant, this is not good to extinguish the seignory or services, but it will discharge all the arrearages.

If a rent-charge, common of pasture, or any other profit appender be issuing out of my land, and he that hath it doth release it to me; this is a good Release and will extinguish it. But if I be disseised of the land, and have but a right at the time of the Release made: the Release is not good, as it is in the case of a rent-service and a feignory. But if lands be given to me in tail, or for life rendering rent, and I be disseised, and after the Donor release to me all his right in the land; this is a good Release and shall extinguish the rent. So if in this case where I am Tenant in tail, and I make a Feoffment in Fee rendering rent, and after I release to the Feoffee, this is a good Release, and hereby the rent is extinct. And if two Coparceners be of a rent, and one of them take the terretenant to Husband, and after either of them release, these Releases will be good.

If one disseise me of land, and then grant a rent-charge out of the land; and I reciving the same, grant Release to the Grantee: this Release it seems is good, and will bar me so, as after my re-entry I shall not be able to avoid it.

Of an Advowson, &c.

If two have the grant of the next Advowson or Avoidance of a Church, before it be void, one of them may release to the other, but afterwards they cannot.

Lit. Sect.
480.
Co. super
Lit. 280,
305.
Perk. Sect.
701.

Lit. Sect.
457.
Co. 10. 51.
super Lit.
268.

Lit. Sect.
480. 336.
357.
Co. super
Lit. 304.
Lit. Sect.
455. 416.
Co. super
Lit. 273.

Lit. Sect.
527.
Co. super
Lit. 300.

Co. super
Lit. 270.

If

Co. l. 112.
Per. Rec.
217. 174.

If *A* make a Feoffment in fee, gift in tail, Lease for life or years to *B* on condition, that upon such a contingent it shall be void: In this case *A* may before the condition broken, release all his right in the land, or release the condition to *B*; and this will be good to make the estate absolute and to discharge the condition. So if a Feoffee on condition make a gift in tail or Lease for life, and after the Feoffor release to the Donee or Lessee; this is a good Release to discharge the condition. So if a Copy holder surrender to the use of another on condition, and this is presented to be without condition, and after the Surrendror doth release to him to whose use the Surrender was made all his right, &c. this is a good Release, and doth extinguish the condition. But if a Disfeisor make a Feoffment on condition, and the Disfeisee release to the Feoffee on condition; howsoever this doth bar the right of the Disfeisee, yet it doth not discharge the condition.

Of a Condition.

Co. l. 112.
113. 173.
174.

Where a power or authority is such, that doth respect the benefit of the Lessor, as in the usual cases of power of revocation of uses, when the Feoffor, &c. hath power to alter, change, determine or revoke the uses being intended for his benefit, and he release to any one that hath a Freehold in possession, reversion or remainder, by the former limitation: This is a good Release, and doth extinguish the power, and make the estates that were before defeasible absolute, and he doth seclude him from any power of alteration or revocation. But if the power be collateral, or to the use of a stranger, and nothing to the benefit of him that makes the Release: As if *A* make a Feoffment to *B* to divers uses, provided that *B* shall revoke the uses, and *B* release to any one of them that hath a use, this doth not extinguish the power, as in case where the power is given to *A*, and *A* doth release it.

Of a power of Revocation.

Bro. Release 88.
of H. 7. 39.
Co. 5. 27.

If a Feoffment be made with Warranty, and the Feoffee release the warranty; this doth extinct it. And so it is of other warranties. But if Tenant in tail release the warranty annexed to his estate tail, this doth not extinguish the warranty.

Of a Warranty.

of H. 7. 39.
Co. 5. 27.

Any man may release any debt or duty due to himself. Also a man may discharge or release any thing, or any wrong done to his Wife before or after the marriage, and therefore if a trespass were done, or a promise were made to my Wife before the marriage, I may at any time during the marriage release this. So if any wrong be done, or obligation, statute, or promise made to her alone, or to her and me together, at any time during the marriage, I alone may release and discharge this. And if my Wife be an Executrix to any other man, I may release any debt or duty due to the Testator.

Of debts and other duties personal. 1. In respect of the persons.

Husband and Wife.

And

And if a Legacy be given to a woman sole to be paid at Michaelmas next, and I marry her, and I release the Legacy before the day: it seems by this the Legacy is gone. Per d. 29. B. R. Mich. 17 Jac. Co. 5. 37.

Infant.

An Infant Executor may release a debt duly paid unto him of the Testators debt. But if he release that which he doth not receive, it is a void Release. And regularly the Release of an Infant is void.

In respect of the time.

An Executor before probate of the Will may release a debt or duty due to the Testator, and this Release is good to bar him. Co. 5. 37. A. 39.

A future or contingent promise may be released and discharged before the contingent happen. Trin. 4 Jac. in Eltons case.

A debt on an obligation or rent may also be released before the day of payment, as well as after, but not by the same words. And therefore if one promise to *I S* that upon the surrender of *I S* he will pay him an hundred and ten pound, and after the promise and before the Surrender he release this debt; this doth discharge the debt. But if the promise be that if the Surrendree shall sell the land, and shall have five hundred pound, that then he shall pay the Surrendror an hundred pound more, and the Surrendror before sale release this sum; this is no discharge of it. And yet a release of the promise is a discharge of it. And if *A* promise to me, that if *I S* do not pay me an hundred pound *i. Octobris*, that he doth owe me, that *A* will pay me the hundred pound *i. Novembriis*, and I *10. Septembriis* release to him this debt, or all Actions and Demands; in this case this Release is not good to discharge this promise. But by a release of the promise, the same is discharged. Hil. 14 Jac. B. R. B. 11. co versus Heirs.

Of actions.

If a man release to another all Actions, and do not say further which he hath against him; this is as good a Release as if these words were inserted, *Quod necessario subintelligitur non deest*. Bro. Release 297.

And all these Releases must be made by apt words, and such as law shall judge sufficient for that purpose. Co. 9. 33.

And in all these cases care must be had there be no mistakes: for mistakes will make Releases and Confirmations void as well as other Grants. And therefore if *A* make a Release to *B* in this manner: *Noverritis, &c. me A de B remisisse, &c. B omnes actiones quas idem B habet versus A*, whereas it should be *quas idem A habet versus B*: this Release is void. Bro. Release 34. 35.

8. What shall be said a Release in Law. Or not. And how. Of a Seignory

If there be Lord and Tenant, and the Lord purchase the tenancy, by this means the services are released and extinct in Law. And if the Lord disfeise his Tenant, and make a Feoffment in Fee by Deed or without Deed; this is a Release in law of the Seignory. Co. Supp. Lit. 246.

If

Co. 120.

If a Disfeisor disseise the Heir of the Disfeisor, and make a Feoffment with or without a Deed: this is a Release in Fee in Law of the right. And if he make a Lease for life, this is a Release in Law of the right, so long as the Lease doth last.

Of a right to land.

Co. Super
Lit. 364.
§ R. 4. 3.
§ R. 4. 2.

If a Creditor, as an Oblige, or the like, make a Debtor, as the Obligor, &c. his Executor, by this means the action is released by act of law, and yet the duty remains still, for the Executor may retain so much of the goods of the Testator. And if the Creditor be a woman, and she marry with the Debtor, by this the debt is released in Law. And if there be two Obligees or Debtors, and one of them being a woman, is married to the Obligor, this is a Release in Law of the debt, albeit the Creditor be an Infant.

Of a right of action.

Executor.

M. 30. R.
§ 1.
§ 1. 3. R.
Adjudge
Co. 1. 36.

But if there be a woman Executrix to the Debtee, and she take the Debtor to the Husband, this is no Release in Law.

And if an Obligor be made Administrator of the goods and chattels of the Oblige, this is no Release in Law.

Co. 61. 5.
§ 1. 3. R.
Relief. 14
§ 1. 3. R.
§ 1. 3. R.

Where divers joyn in any Suit or Action to recover any personal thing of which they are to have the joynt benefit or interest when the law doth not compel them to joyn, there the Release of one of them shall bar all the rest. And therefore if two men joyn in an Action of Debt, Trespass, or the like, and one of them alone doth release to the Defendant, this is a bar to the other Plaintiffs also. So if a Statute or an Obligation be made to two or more, and one of them release it to the Comor or Obligor, this is a discharge of the whole duty, and a bar to the rest, so that they can make no use of the Statute or Obligation. But if divers be charged in an Action, and they for the discharge of themselves onely joyn in a Suit or Action, where also they can do no otherwise, being compelled by law to joyn; in this case the Release of one of them shall not hurt the others. And therefore if divers joyn in a Writ of Error, Attaint, or *Audita querela*, and one of them release to the Defendant in the Writ, this will not bar the rest of their remedy, but they may go on in their Suit notwithstanding.

9. The force and vertue of it. And how it shall enure and be construed and taken.

1. In respect of the persons. And where a Release made by one shall bind another. And where not. And where a Release made to one shall enure to others. Or not.

16 R. 74.

If there be two or more Executors, and one of them alone release a debt or duty to the Testator before Judgement had in a Suit, had by all the Executors against the Debtor, this will bar all the rest. But otherwise it is after Judgement had.

Executor.

Co. Super
Lit. 364.
§ R. 4. 3.
§ R. 4. 2.
Co. Super
Lit. 373.
§ R. 4. 3.
§ R. 4. 2.
Co. 1. 36.

If a Writ of Ward be brought to two, and one of them release, this shall not bar his companion, but shall enure to his benefit, for hereby he shall have the whole Ward.

A Release made to the Tenant in tail, or for life, of the right to the land, shall avail and enure to him that hath a reversion.

OR 11

to right a 30
final

to right a 30
final

to right a 30
final

For or remainder is Dead. And so it is. *A Release made to him that hath a remainder or reversion with avail and enure to the benefit of him that hath the estate tail for life, or years precedent. As if a Disseisor make a Lease for life, and the Dissee release to the Tenant for life; this shall enure to the Disseisor. So if he or a Tenant for life, make a Lease for life, the remainder for life, the remainder to tail, the remainder in fee, and the Dissee or first Lessor doth release all his right to any of them in remainder; this shall enure unto, and benefit all the rest. And if the husband make a lease of his Wives land to one for life, the remainder to another in fee, and the wife after his death doth release all her right in the land to him in remainder; this shall enure to the Lessee for life.*

If a Disseisor make a Lease for life, and the Dissee release all his right to the Tenant for life; this shall enure to the benefit of the Disseisor. But if the Dissee release no more to the tenant for life but all actions: this Release will not benefit him in remainder or reversion after the death of the tenant for life.

Co. super
Lit. 275.

If a Disseisor make a Feoffment to two in fee, and the Dissee release to one of the Feoffees, this shall enure to both.

Lit. 262
473.

If Tenant in tail be disseised by two, and he release to one of them, this shall enure to both. But if the Kings Tenant be disseised by two, and he release to one of them, this shall not enure to the other. So if two Joyntenants make a Lease for life, and then disseise the Tenant for life, and he release to one of them; in this case his companion shall have no benefit by it.

Co. super
Lit. 276.

If Tenant in fee simple be disseised by two, or two do abate or intrude, and he doth release to one of them; the other shall have no benefit by this. But if Tenant for life do after a disseisin done to him, release to one of the Disseisors; this shall enure to both.

Lit. 262
473, 474.

And if two Disseisors be, and they make a Lease for life or years, and after the Dissee doth release to one of the Disseisors this shall enure to them both, and to the benefit of the Lessee for life also.

Co. super
Lit. 276.

And if Lessee for years be ousted, and he in reversion disseised, and the Lessee release to the Disseisor; the term of years is hereby extinct, and the Dissee may take advantage of it, and enter presently.

But if two Joyntenants in fee be disseised by two Disseisors, and one of the Disseees release to one of the Disseisors all his right; this shall enure to the other, for this extendeth but to a moiety.

If a Release be made by a woman of her Dower to the Guardian in Chivalry; this shall enure to the Heir, and he may take advantage of it.

Co. super
Lit. 276.

If

If Tenant for life be disseised by two, and he in the reversion and the Tenant for life joyn in a Release to one of the Disseisors; this shall not enure to the other. But if they do severally release their several rights, their several Releases shall enure to both the Disseisors.

Co. Idem. If a Mortgage upon condition after the condition broken be disseised by two, and the Mortgagor that hath the title of entry, doth release to the one Disseisor; this shall enure to both. And like law is for an entry for Mortmain, or a consent to ravishment, &c.

Co. Super Lit. 269. If there be Lord and two Joyntenants, and the Lord release to one of them; this shall avail his companion.

If Tenant in Fee simple make a Feoffment in Fee, and after the Lord release to the Feoffor, this shall not enure to the Feoffee, to extinguish the Seignior. But if he release to the Feoffee, this shall enure to the Feoffor to extinguish the Seignior.

Co. Super Lit. 270. If there be Lord and Tenant, and the Tenant make a Lease for life, the remainder in Fee, and the Lord release to the Tenant for life; the rent is hereby wholly extinguished, and he in remainder shall take advantage of it, as when the Heir of a Disseisor is disseised, and the Disseisor makes a Lease for life, the remainder in fee, and the first Disseisee doth release to the Tenant for life; this shall enure by way of extinguishment to him in remainder, viz. to the Lessee for life first, and after to him in remainder.

Co. Super Lit. 271. If two Tenants in common of land grant a rent of forty shillings out of it, and the Grantee release to one of them; this shall not enure to the other. But if one be Tenant for life of lands the reversion in fee to another, and they joyn in the grant of a rent out of the lands, and Grantee release either to the Tenant for life, or to him in reversion; this shall enure to the other, and extinct the whole rent.

Co. Idem. If two men gain an Advowson by usurpation, and the right Patron release to one of them; this Release shall enure to them both.

Co. 559. Super Lit. 272. If two be bound jointly and severally in any Obligation, or other Specialty, and the Obligee, &c. release to one of them; this shall enure to discharge the other also, if it be a good Release as to him that makes it. But otherwise it is in case of a Release made by the King.

Prerogative.

And if two do a trespass to another together, and he to whom it is made doth release it to one of them, this shall enure to discharge the other.

Dier 319. Co. Super Lit. 273. 274. 44 H. 8. 64. If Husband and Wife, and I purchase to them and their Heirs The Husband of the Husband, and after I release all his right in the land to the and Wife. Husband; the Wife shall not have benefit by this, but it shall enure to the Husband alone.

And if there be two women joyn't Disseisefesses, and the one take a Husband, and the Disseisee release to the other; in this case the Husband and Wife will take no benefit by this. And if the Disseisee release to the Husband, this shall enure to him and his Wife and the other woman.

And if one that hath a rent out of my Wives land release it to me and my Heirs; this shall enure by way of extinguishment, and my Wife shall have advantage of it. And yet if the words be [Grant and Release] the rent to the Husband and his Heirs, in this case the Husband may take as a grant if he will.

Note.

But here note in all these cases of Releases, when one man will take advantage of a Release made to another, he must have the Release to shew and plead.

Co. Super
Lit. 232.

If I be disseised, and I release to the Disseisor all actions I have or may have against him; this is but personal and shall not be expounded to bar my Heir after my death of his remedy, neither will it bar me of my remedy against his Heir after his death.

Co. 10. 51.
22 H. 6. 1.

So if I deliver goods to another, and afterwards I release to him all actions, and then he die: by this I am not barred so, but I may sue his Executors.

In respect of
the thing re-
leased.
Of all actions.

See more in *Confirmation. chap. 18. Numb. 7.*

A Release of all Actions without any more words, is better then a Release of all actions real onely, or a Release of all actions personal only: For by a Release of actions, or a Release of all manner of actions without more words are released and discharged all real, personal and mixt actions then depending, and all causes of suit for any real or personal thing: as Appeals for the death of an Ancestor, Conspiracies, Suits by *Scire facias* to have execution of a Judgement, detinue for Charters.

Co. 8. 153.
5 28. 70.
Kilw. 114.
Co. Super
Lit. 186.
29. 293.
289.
Lit. Sed.
492. 506.
506. 512.
513.
Bro. Stat.
39.

And if two conspire to indite me, and I release to them all actions, and after they go on with their conspiracy; by this Release I am barred to do any thing against them. By this Release also of all actions, a debt due to be paid upon a Statute or an Obligation at a day to come, albeit the Release be before the day is discharged, and by this also the Statute it self, if it be at any time before Execution, is discharged.

And if one be to pay forty pound at four days, and some of the days are past, and some to come, and the Debtee make such a Release, by this the whole debt is discharged.

Also in a *Scire facias* upon a Fine or Judgement, this Release is a good plea in Bar.

But this release of all actions will not discharge Executions, or bar a man of taking out of Executions, except it be where it must be done by *Scire facias*. Neither will it discharge or bar a man of

suits.

suits by *Audita Querela*, or Writ of Error to reverse an erroneous judgement, neither will it discharge Covenants before they be broken, nor will it discharge any thing for which the Lessor had no cause of action at the time of the Release made, as if a woman have title of dower, and do release all actions to him that hath the reversion of the land after an estate for life; or a man is by an award to pay me ten pound at a day to come, and before the time I make such a Release; or I make a Lease rendring rent, or an annuity is granted to me, and before the rent day I make the Lessee or the Grantor such a Release; in these cases, and by a Release in these words without more, the dower, debt, rent, or annuity, is not discharged.

Lit. Sect.
496, 497.

And if a man have two remedies or means to come by land, as action and entry, or by goods, as action and seizure, or the like; in this case by a release of all actions he doth not bar himself of the other remedy. *Et sic è converso*.

Co. Super
Lit. 292.

And if a man doth covenant to build an house, or make an estate, and before the covenant broken, the Covenantee doth release unto him all actions; by this the covenant it self is not discharged. And yet after the covenant is broken, this Release will discharge the action of covenant given upon that breach.

Co. 2. 151.
Plow. 484.
M. 7. 8.
Co. 3. 29.
6. 1.
Super Lit.
445.

By a Release of all a mans right into any lands or tenements without more words, is released and discharged all manner of rights of action and entry the Releffor hath to, in or against the land, for there is *jus recuperandi, prosequendi, intrandi, habendi, residendi, percipiendi, possidendi*; and all these rights, whether they acruer by Fine, Feoffment, descent or otherwise, are extinct and discharged, so that if the Releffee have gotten into the land of the Releffor by wrong, by this Release the wrong is discharged, and the Releffee is in the land by good title.

Of all right.

Also by this Release are discharged and released all titles of dower, and titles of entry upon a condition or alienation in mortmain.

And if a woman have title of dower after an estate for life, and make such a Release to him in reversion, this doth barr her. By such a Release also from the Lord to the Tenant, the services are extinct.

Co. 10. 47.
Super Lit.
289.

But this Release will not bar a man of a possibility of a right that he hath at the time of the Release, or of a right that shall descend to him afterwards. And therefore if the Consee of a Statute before execution release all his right into the land to the terretenant; or the Heir of the Disseisor in the life time of his father do release to the Disseisor all his right; these Releases do not bar them. Nor will this Release bar a man of an *Audita Querela*, and such like things. And yet if the Tenant in a real

action

action after the Demandant hath recovered the land, release to him all his right in the land; this doth bar him of a Writ of Error for any error in the proceeding in that suit.

And if there be Lord and Tenant by Fealty and Rent, and the Lord by his Deed reciting the tenure, doth release all his right in the land, saving his said rent, by this Release the right of the Seignior, save onely of the Seignior of the Rent and Fealty, is extinct. And if the Lord release to the Tenant all his right to the land and Seignior, *salvo sibi dominio suo, &c.* hereby the services onely, not the tenure is extinct.

Co. super
Lit. 150.
Dier 159.

And if one have a rent-charge out of my land, and make such a Release of all his right to the land to me that am the Terretenant without exception of the rent; hereby the rent is extinct and gone for ever.

Perk. Sed.
644.

Of all title.

By a Release of all a mans title into lands or tenements, without more words is released, and discharged as much as is released by the release of all a mans right, and both these Releases have the like operation: For howsoever title strictly and properly is where a man hath lawful cause of entry into lands whereof another is seised, for which he can have no action, yet it is commonly taken more largely, and doth include a right also. And *Tinimus est iusta causa possidendi quod nostrum est.*

Kelw. 484.
575.
Co. super
Lit. 265.
345.

Of entry or right of entry.

By a Release of all entries or rights of entry a man hath into lands, without more words, a man is barred of all right or power of entry into those lands upon any right whatsoever. And if a man have no other means to come by the land but by an entry, and he hath released that by these words, he is barred for ever. But if one have a double remedy, viz. a right of entry, and an action to recover his right by, and then release all entries; by this he is not barred of his action.

Co. 8. 151.

Of actions real.

By a Release of all actions real without more words, are discharged all real and mixt actions then depending, and all causes of real and mixt actions not depending. And therefore all causes of suing of Assises, Writs of Entry, *Quare impedit*, Actions of Waste, and the like, which the party hath at the time of the Release made, are hereby discharged. But this Release will not bar him that doth make it of any causes of action that shall arise and accrue afterwards. Neither will it bar him of an Appeal of death or robbery, Writ of Error, or any such like thing. Nor of any thing which a Release of all actions will not bar. And yet when land is to be restored or recovered by Judgement in a Writ of Error; this Release is a bar to the Writ of Error. So if a Judgement be given upon a false verdict in a real action, a Release of all actions real is a bar in an Attaint.

Lit. Sed.
492, 493.
495.
Co. 8. 151.
Lit. Sed.
115. 500.
Co. super
Lit. 265.
289.

By

Re-
lease 47.
Co. super
Lit. 281.
9 H. 6. 57.
Lit. sect.
302

By a release of all Actions personal, without more words are discharged all personal Actions then depending, and all causes of personal Actions wherein a personal thing only is to be recovered, and therefore hereby are discharged all causes of suing out of Actions of Debt, Trespass, Detinue, on the like. Also all mixed Actions, as Actions of waste *Quare impedit*, an assise of novel disseisin, Writ of Annuity, Appeal of maihime, and the like.

Of Actions personal.

Co. super
Lit. 281.

And if debt &c. or damages be recovered in a personal Action by false Verdict, and the Defendant bringeth a Writ of Attaint, or if a Writ of *Audita Querela* be brought by the Defendant in the former action to discharge him of execution, by this Release the Defendant in both cases is barred of his suit.

Co. super
Lit. 281.
Lit. sect.
303.

Also when by a Writ of Error the Plaintiff shall recover or be restored to any personal thing onely, as Debt, Damage or the like: as if the Plaintiff in a personal Action recover any debt or damages, and be outlawed after Judgement: in this case in a Writ of Error brought by the Defendant upon the principal Judgement, this Release will bar him. But where by a Writ of Error the Plaintiff shall not be restored to any personal or real thing, this Release is no bar: as if a man be outlawed in an action personal by process upon the original, and bring a Writ of Error, and then release, this is no bar to him.

Lit. sect.
497. 498.
500.

If a man by wrong take or finde my goods, or they be delivered to him, and I release to him all actions personal; notwithstanding this Release I may in this case take my goods again, albeit I be barred of my action by this Release. Neither is this Release a bar in an Appeal of robbery or death. Neither will it bar in any case where a Release of all actions will not bar. Neither is it any bar to an action of debt brought for an annuity, granted for a term of years for any arrearses that shall grow due after the Release. Nor for any rent or sum of *nomina pene*, when the Release is before the same day, or *nomina pene* happen. Neither is it a bar in such real actions wherein damages are recoverable onely by the Statute, and not by the common law, as in a Writ of Dower, Entry, *sur disseisin in la per Mordantier*, *Aile*, &c.

Co. super
Lit. 281.
Lit. sect.
304.

By a Release of all debts without more words, are discharged and released all debts then owing from the Releasee to the Releaseor upon specialties, or otherwise, all debts due also upon Statutes. And therefore if the Connor himself, or his land, be in execution for the debt, and he hath such a Release he must be discharged; and so he cannot be upon a Release of all actions.

Of Debts.

Co. & 153.
super Lit.
301.

By a Release of all duties without more words is a Releaseor barred, and the Releasee discharged of all Actions, Judgements, and Execu.

Of Duties.

142
mofa 10
January

A Release.

Chap. 19.

Executions, and of all Obligations. And if the body of a man be in execution, and the Plaintiff make him such a Release, hereby he shall be discharged of Execution, because the duty it self is discharged. And if there be rent or services behind to the Lord from his Tenant, and the Lord make such a Release to his Tenant, by this it seems the arrearages are released.

Of Suits.

This word is somewhat a more large extent then Actions, for by a Release of all Suits without more words is released and discharged as much as by a Release of all Actions. And hereby also are discharged all Executions in the case of a Subject. But in the case of the King it doth not release Executions. And this doth not release a covenant before it be broken.

Co. B. 114.
857. 5. 70.
Super. La.
291.

Prerogative.

Of Debates, quarrels, Con- troversies.

By a Release of all Quarrels, without more words, all actions real and personal, and all causes of such Actions are released and discharged. So likewise by the Release of all Controversies or by the Release of all Debates. But this will not bar the Releasor of any cause of Suit that shall arise after, and was not at the time of the Release, as the breach of a Covenant which shall be after, albeit the Covenant be before, is not discharged hereby.

Co. Super.
Lit. 292. E.
157. 5. 70.

Of Covenants.

By a Release of all Covenants without more words, all Covenants then broken, and all that shall be after broken that were then made, and in being are discharged. *Qui destruit medium destruit finem.*

Co. F. 112.
10. 50.
Super. La.
292.

And therefore if a Lessee do covenant to leave a house leased to him at the end of the term, as it was at the beginning of the term, and the Lessor before the end of the term release to the Lessee all Covenants, this doth discharge the Covenant. But this Release doth discharge nothing else but Covenants.

Adjudic.
Hil. 4. Jac.
8. R. Hen.
4. 10. 11.

Of Statutes.

By a Release of all Statutes from the Conussee to the Terretenant without more words the Statute is discharged. And yet if he release all his right in the land of the Conusor, this will not discharge the land of execution.

Co. 10. 47.

Of Error.

By a Release of all Errors and Writs of Error, all Errors and Writs of Error, and that before they be brought, are extinct and discharged. And if a man be outlawed in a personal Action by Process upon original, and make such a Release, this will bar him.

Co. 2. 14.
Lit. 292.
503.

Of Warranty.

By a Release of all Warranties or Covenants real, all Warranties then made and being, are for ever discharged.

Lit. 292.
148.

Of Legacies.

By a Release of all Legacies without more words, a man doth bar himself of all the Legacies given him in *presenti* or *future*, so that if he be to have a Legacy at twenty four years old, and at twenty one years of age he release to the Executor all Legacies or this Legacy in particular, this is a bar to him of this Legacy for ever.

Co. 10. 11.
Dier 56.
Co. Super.
Lit. 74.

ever. And yet a Release of all demands in this case is no discharge of this Legacy.

By a Release of a rent the rent is extinct and discharged whether the day of payment be come or not. But a Release of all Actions will not discharge a rent before the day of payment come.

By a Release of all Promises or Assumpsits without more words, a man may bar himself of a contingent or future thing that by other words could not be released, as if a man promise to me that if I do not pay me one hundred pound the tenth of March next, that he will pay it me the twentieth of that moneth, and before the time I release him to all actions and demands, this will not discharge the Promise. But if I release to him all promises, this will bar me. *Et sic de similibus.*

By a Release of all Judgements, without more words, is he that maketh it barred of the effect of any Judgement he hath against the Releasee. for if Execution be not taken out, he is now barred of it. And if the Releasee, or his land, &c. be in execution, he, and it shall be discharged thereof by *Audita Querela*. And by a Release of all Executions, without more words, a man is barred of taking or having out of any Execution upon any Judgement either before *Scire facias* or after. But if after Execution be made by *Capias ad Satis Eligis*, or *Fieri facias*, the Plaintiff release to the Defendant all Executions, he cannot plead such a Release but he must have an *Audita Querela*; and that he may have to discharge him of Execution.

By a Release of all Appeals are discharged all Appeals of Felony, of death, of robbery, of rape, of burning, of larceny depending, and all causes not yet moved also.

By this Release of all Advantages, it seems actions of debt upon account are discharged.

By a Release of all Conspiracies, all Conspiracies past are discharged, and such also as are onely begun and shall be prosecuted and perfected after the Release, are likewise hereby discharged.

By a Release of all Forgeries before publication, the forgery is discharged but not the publication, and therefore the Releasee may take his remedy for that notwithstanding.

A Release of all Demands is the best Release of all, and this word is the most effectual word of all, and doth indeed include and comprehend within it most of all the Releases before. By a Release therefore of all Demands, without more words are released all Rights and Titles to Lands, Warranties, Conditions annexed to Estates before they be broken or performed, and after they be broken. Also by this Release, are released and

Co. super
lit. 296.

Adjudg.
Hil. 46. ac.
B. R. Bri-
fcoe. verif.
Hil. 11.
Co. 10. 51.

Hil. 10. 11.
97. Co. 8.
114. super
lit. 296.

Co. super
lit. 296.
Hil. 11.

Co. 8. 150.

Edw. 1. 119.

Co. 10. 48.

1591. 10
728. 112

Co. super
lit. 291.
Co. 1. 254.
114. super
97. 507.
510.

Of Rents.

Of Promises.

Of Judgments
Of Executions

Audita Querela.

Of Appeals.

Of Advantages.

Of Conspiracies.

Of Forgeries.

Of Demands
or Claims.

charged a Tenant: Obligations, Contracts, Recognizance, Covenants, &c. is, Commons, and the like. Also all manner of Actions, real and personal, Appeals, Debts, Duties, Also all manner of Judgements, Executions, Also all Annuities, and Arrearages of Annuities and Rents. And therefore if a man have a title of entry, by force of a condition, or of a right of entry into any lands, by such a Release the Right and Title is gone. And if a man have a rent-service, rent charge, covenors, or other profits to be taken out of the land, by such a Release to the Tenant of the land it is discharged and exting.

And therefore if a Termor for years, grant the land by indenture to A. rendering rent, and at the end of the first year he release to the Grantee all Demands; the rent is hereby exting during all the time. And a Release of all Claims it seems is much of the same nature.

But by a Release of all Demands or of all Claims, is not released any such thing as whereof a Release cannot be made, as a mere possibility, or the like.

Neither will this Release discharge a Covenant or Promise that is future and contingent before it be in being. Nor a Covenant before it is broken: and therefore if the Lessee of a house covenant to leave it as well in the end of the term, as it was in the beginning of his term, and before the end of the term the Lessor release to the Lessee all demands: this is no bar to an action brought for a breach of the Covenant afterwards.

And if a man in consideration of a sum of money given to him by a woman sole, assume to her that if she marry one M that he will pay to her after the death of M one hundred pound by the year if she survive him, and she marry him, and the Husband release all demands and then die; this is no bar to the duty. So if one promise a woman that if she will marry him, that he will leave her worth one hundred pound if she do survive him, and before the marriage she release to him all actions and demands; this doth not discharge the promise.

Note.

And note that all these words are of the same force, when they are joyned with other words, as when they are alone.

If two Tenants in common of land grant a rent-charge of forty shillings out of it to one in fee, and the Grantee release to one of them; this shall extinguish but twenty shillings, for that the Grant in judgement of Law is several.

If one have several causes of Action against two, and make a joynnt Release to them: this shall be taken to be a Release of all joynnt and several causes of action.

Adjdg.
B. R. p. 17
Jac.
Worron
case,
Co. 3. y.

Hil. 4 Jac.
B. R. Han-
cocks cas.
adjudge.

Hil. 6 Jac.
B. R. Bet-
cher and
Hudson
case.

Co. super
Lit. 267.

19 H. 4.

So

Bro. Release 31. 29

So if an Executor have some cause of action for himself, and some for his Testator, and he release all actions, indefinitely; this Release doth discharge both sorts of actions.

Co. super Lit. 280.

If the Tenancy be given to the Lord and a stranger, and to the Heirs of the stranger, and the Lord release to his companion all his right in the land; this shall enure not onely to pass his estate in the tenancy, but also to extinguish his right in the Seignior.

Perk. Sec. 71. Bro. Release 85, 98. 3.

If there be Lord and Tenant of two acres, and the Lord release all his right in one of them to the Tenant; hereby the services are extinct for both. So if one have a rent-charge out of twenty acres, and release all his right in one acre; hereby all the rent is extinct. And yet if A lease white acre to B for life rendring rent, and afterwards doth release part of the rent; this is good onely for such part.

Bro. Release 65,

If I be seised of land in Fee, and I make a Lease of it to one for life, and after I release all my right in the land for the life of the Tenant for life, so as neither I nor my Heirs shall have claim, or challenge any thing or right in that land for the life of the Tenant for life; by this release nothing is extinct or discharged, but the causes of action of waste that were then, and not any cause that shall happen afterwards.

Dier 307.

If a Statute be entred into the twentieth of April, and the Comtee by a Release dated the nineteenth of April (meaning to except this Statute) doth release all debts and demands till the making of the Release; by this Release the Statute is discharged: But if the words had been to the day of the date of the Release,

COUNTY A.

Per Justice Doodridge Trin. 14. Jac. Reg. 53.

If a promise be of two parts, and he to whom it is made doth release one part, it seems this is a Release of both.

If A on the first of Jan. enter into an Obligation of forty pound to B, and B on the thirteenth of July make a Deed thus, it is agreed between B on the one part, and A on the other part, that upon good consideration B doth acknowledge himself fully satisfied and discharged of all Bonds, Debts or Demands whatsoever from the beginning of the world to this day by the said A, and that he the said B is to deliver all such Bonds as he hath yet undelivered to A, except one Bond of Forty pound yet unforfeited, which is for the payment of 6s. which was the Obligation before: In this case it was adjudged a good Release and discharge of all the Bonds excepting this one; and that this exception shall go to all the promises.

Lit. Sec. 469. 490. Co. super Lit. 272. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

A Release of a right, or an action, cannot be for a time, but of the time or it will be for ever. And therefore if a Release be made to any estate, one

one that hath a fee simple by wrong by him that hath the right for one hour, one year, for life or years, this is a good Release for ever.

And if the Disfeisee release all his right in the land to the Disfeisor without naming his Heirs, or setting down any time how long the releesee shall have the land or the right of the Disfeisee herein: this is a good release for ever, and doth make the estate of the Disfeisor good for ever, and so doth make a good estate in Fee simple without these words [his Heirs, &c.] And if the Disfeisor or his Heir make a gift in tail, or a Lease for life, and the Disfeisee release all his right to the Donee or Lessee for life, To have and to hold for life only, this is a good Release of his right for ever.

But if the Disfeisee do disseise the Heir of the Disfeisor, and make a Lease for life (which is a Release in law,) by this the right is released during that time onely. So if one Joyntenant or Parcenor release to the other all his right in the land, without the word [Heirs] or any more words: This Release doth give to his companion his whole interest for ever. And when the Lord, or Grantee of a rent, release to the Tenant, or terretenant generally: by these Releases a Fee simple is transferred without any words of Heirs, &c. and yet the Lord may release his seigniority to his Tenant, to hold to him in tail or for life, and this shall be taken and enjoyed accordingly. But if the Lord doth release the Seigniority to his Tenant without any words of Heirs put in the Deed, the same is extinct.

And if I let land to a man for term of years, and after I release to him all my right which I have in the land, without using any other words in the Deed: or release to him, To have and to hold for his life: In both these cases he hath an estate for his life onely.

Lit. Sed.
545, 546
465.
Plow. 556
Dier 263.

And if I lease land to a man for his own life, and after release to him, to have and to hold for his own life: hereby he hath but an estate for his own life.

But if I make a Lease to him for anothers life, and after release to him *Habendum*, to him for his own life, by this he hath an estate for his own life.

But if I be seised of land in Fee simple, and let it to another for life or years, and then release all my right to him, To have and to hold to him and his Heirs, hereby he hath the Fee simple. And if I release all my right to him, to have and to hold, to him and the Heirs of his body, hereby he hath an estate tail.

And if one be seised in Fee of a rent service or charge, and grant it first for life, and then release it to the Grantee, To hold

Lit. 68.
549.

hold to him and his Heirs, or to him and the Heirs of his body, this shall enure to an enlargement according to the agreement.

But if one grant a rent-charge out of the land *de novo*, and after release to the Grantee all his right in the rent To have and to hold to him in fee simple or fee tail, this doth not enure the estate.

Lit. Sec.
606. 610.
24 E. 3. 28.

And if Tenant in tail or for life, make a Lease for years, and after by Deed doth release all his right to the Lessee for years in possession, to hold to him and his Heirs for ever; this will not make the estate of the Lessee good for longer time then the life of the Releffor.

Co. super
Lit. 379.

If one make a Lease for ten years, the remainder for twenty years to another, and he in remainder release all his right to the Lessee for ten years; in this case the Releffee hath an estate for thirty years and no less, for one Lease for years cannot drown in another.

Lit. Sec.
526.
Co. super
Lit. 299.
300.

If I let land to a woman sole for her life, or for years, and she take a Husband, and after I release to them two to hold for their lives: This shall enure no further then the intent, and in the first case he shall hold joyntly with his Wife, but in her right whiles she doth live, and after for his own life if he survive, and in the last case they shall have the Free hold joyntly.

Co. super
Lit. 287.

If there be Lord and Tenant by Fealty and Rent, and the Lord granteth the Seigniorie for years, and the Tenant attorneth, and the Lord releaseth his Seigniorie to the Tenant for years, and to the Tenant of the land generally: By this the Seigniorie is extinct for ever, and the Estate of the Lessee also. But if the Release be to them and their Heirs: then the Lessee shall have the inheritance of the one moiety, and the other is extinct.

Terms of
the Law.

It is a Discharge in writing of a sum of money or other duty which ought to be paid or done; As if one be bound to pay money on an Obligation, or rent reserved upon a Lease, or the like, and the party to whom the money or duty should be paid or done upon the receipt thereof, or upon some other agreement between them maketh a writing under his hand witnessing that he is paid; or otherwise contented; and therefore doth acquit and discharge him of the same; the which is such a discharge and bar in the Law that he cannot demand and recover the same again: Contrary thereunto if the Acquittance be shewed.

10. Acquittance. *Quid.*

11. Where a man is not bound to pay money without he hath an Acquittance.

The Obligor is not bound to pay money upon a single Bond unless the Obligee make to him an Acquittance or Release. Nor is he bound to pay it before he hath the Acquittance. And in this case the Obligor may compel the Obligee to make him an Acquittance. And so also it is in case of a Statute Merchant, one is not bound to pay the money thereupon before he hath the Acquittance or Release of the Plaintiff. But otherwise it is in case of an Obligation with a condition, for there a man may aver payment.

And because Statutes, Recognisances and Obligations are often used, and tend to the strengthening of the Common Assurances of the Kingdom, we may not in any wise pass them over, but must take some survey of them. And first of a Statute.

42 E. 4. c. 1.
41 E. 3. c. 1.
7 H. 7. c. 1.
22 E. 4. c. 1.
Bro. dec.
49. Oblig.
10.

CHAP.

It is to be noted that the Statute Merchant is a kind of Statute in respect of the manner of making it, but not in respect of the thing it contains. For it is a Statute in respect of the manner of making it, because it is made by the King and the Council, and is a Statute in respect of the thing it contains, because it is a Statute that binds the King and the Council to keep the Statute Merchant. And the Statute Merchant is a kind of Statute in respect of the manner of making it, but not in respect of the thing it contains. For it is a Statute in respect of the manner of making it, because it is made by the King and the Council, and is a Statute in respect of the thing it contains, because it is a Statute that binds the King and the Council to keep the Statute Merchant.

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CHAP. XX.

Of a Statute.

Terms of
the Law.
Stat. de
Mercato-
ribus.
ActonBar-
nells E. 1.

A Statute is a Bond or Obligation of Record: But this word is sometimes used in another sense, viz. for a Decree made in Parliament, called an Act of Parliament.

1. Statute,
Quid.

And of these Obligations there are three kinds: 1. A Statute Merchant: 2. A Statute Staple: 3. A Recognizance. The Statute Merchant, is a Bond acknowledged before one of the Clerks of the Statute Merchant and Mayor, and the chief Warden of the City of London, or two Merchants of the said City for that purpose assigned, or before the Mayor, chief Warden or Master of other Cities, as York, Bristol, or the like; or the Bailiff of any Borough or Village, or other sufficient men for that purpose appointed and authorized, Sealed with the Seal of the Debtor or Recognisor, and of the King, which is of two pieces; the greater whereof is kept by the Mayor or chief Warden, and the lesser by the said Clerk: And the form of it is thus: *Noveritis &c. me A B teneri C D in Centum libris solvend. eidem ad Festum S. Mich. proxim. Et nisi fecero, concedo quod curres super me & heredes meos districtio & pana in Statuto domini Regis edito apud Westm. Dat. &c.* And this albeit at first it was ordained and used for Merchants onely, yet at this day it is and may be used and given by any others, and is become one of the common Assurances of the Kingdom.

2. Quotuplex.
Statute Mer-
chant. Quid.

The Staple doth signifie this or that Town or City, whither the Merchants by common order and commandment do carry their commodities, as Wool, and the like, to utter by the great. And the Statute Staple is either properly or improperly so called: That which is properly so called, is designed to be a Bond of Record acknowledged before the Mayor of the Staple in the presence of one or two Constables of the same Staple, and is sealed with the Seal of the Staple; and sometimes also with the Seal of the party, the which it seems is not necessary. And this is founded upon the Statute of 27 Ed. 3. cap. 9. and was intended, and is used onely for Merchants and Merchandizes of the same Staple: This is of the same nature the Statute Merchant is: That which is improperly so called, is also called a Recognizance, which is also a Bond of Record, testifying that the Recognisor doth owe to the Recognisee a sum of money. And of these there are divers kinds; for there is one Recognizance founded upon the Statute of 23 H. 8. cap. 6. The form whereof is this: *Noveritis &c. me A B teneri C D in Centum libris solvend. eidem ad Festum S. Mich.*

Statute Staple
Quid.

Recognizance.
Quid.

A a

proxim.

proxim. Et si defecero in solutione debti. predicti. volo & concedo quod tunc curras super me heredes & excoutores meos pona in Statuto Stapula debti. pro Marchandisi in eadem emptis recuperand. ordinat. & provis. Dat. &c. And this is always to be acknowledged before the chief Justice of the Kings Bench, or of the Common Pleas in the Term time, or in their absence out of Term, before the Mayor of the Staple at *Westminster*, and the Recorder of the City of *London* for the time being. And it is to be sealed with the Seal of the Connsor, and with the seal of the King appointed for that purpose, and with the seal of the chief Justice, Mayor and Recorder before whom it is acknowledged, and they before whom it is taken do subscribe their names to it: And this was ordained, and may be, and is used by Merchants, or any other whomsoever, for payment of Debts, or Assurance of other things: And this also is of the same nature the Statute Merchant is: And both this and the two former, are much of the nature of Judgements had upon Suits in the Courts of Kings-Bench and Common-Pleas, and therefore: they are called Pocket-Judgements

Pocket Judgements.

Co. 2. 153.

There are also divers other kinds of Recognizances, that are taken by and acknowledged before the Lord Keeper, Master of the Wards, Master of the Rolls, Master of the Chancery, Justices of the one Bench or of the other (some of which are called Bails) Barons of the Exchequer, Judges in their Circuits, Justices of the Peace, Sheriffs, and others; some whereof are by the Common Law, and some by certain Statutes. And amongst these some are without Seal and Recorded onely, and some are sealed and Recorded also: And some of them are in a sum certain, as the Recognizances taken in the Common Pleas for Bail are, and some of them are incertain, as those Recognizances that are taken for Bail in the Kings Bench, which are after this manner, *Si iudicium redditum &c. tunc volo & concedo*, That the Debt recovered against the Defendant shall be levied of my goods and chattels, &c. And these also are much of the nature of the former kinde of Recognizances. And all Obligations made to the King are of the nature, and have the force of a Recognizance.

See Statutes.
33 H. 8. c.
32. 33. H.
7. c. 1. 2.
H. 8. c. 11.
Dier. 315.
277. F. N. B.
251. l. 13.
c. 133. a.
68. a.

Bail.

Prerogative.

Statutes and Recognizances are sometimes single, without any Defeasance, and sometimes they are double; i. e. With a Defeasance or Condition, upon the performance whereof the same are to be avoided.

The Debtor, or he that doth enter into the Statute or Recognizance, is called the Recognisor, or Connsor, and the Debtee, or he to whom it is made, is called the Recognisee or Connssee.

Connsor, Connssee.

Tq.

Dier 39.
Lit. Bro.
Sed. 484.
Sed. F. N.
B. 267.

To make a good Statute or Obligation of Record, the form prescribed must be pursued.

Dier 220.

1. In respect of the persons before whom: And therefore, the Statute Merchant or Staple, or the Recognizance founded upon the Statute of 23 H. 8. may not be acknowledged before any others besides the persons appointed by the Statutes. Neither may any other Recognizance be acknowledged before any, but such as either have power *ex Officio*, and by their Offices to take them, or have special Commission so to do: And therefore a Recognizance taken by a Constable is void. If a Recognizance be made to the Lord Keeper and two others, and it be acknowledged before himself, this is void as to him.

Hollingsworth ser.
for A. B. h
P. 15.
E. Co. B.
Adjudge.

2. In respect of the manner of making and acknowledging of it: And therefore if the substantial form appointed by the Statutes be not observed, it will be void: If therefore a Statute Merchant be not sealed with the Seal of the Debtor, and there be not a Seal of two pieces annexed to it, this is no good Statute, neither can it take effect as a Statute; howbeit in this case, if it be delivered by the party, it may take effect as an Obligation: But if the variance from the Statutes be only in some circumstance, this will not hurt a Statute or a Recognizance. And therefore it is held, That albeit there be no time set for the payment of the money in the Statute, yet the Statute is good, for then it is due presently. And albeit the Statute be written with another's hand, and not with the hand of the Clerk of the Statutes or the like, yet is the Statute good enough. And if a Statute Staple be not sealed with the Seal of the party that doth acknowledge it; yet it seems it is good enough, for the Statute doth not require it: but a Recognizance with, in the Statute of 23 H. 8. cannot be good, except the Seal of the party be to it, for so are the words of the Statute.

Park 3 Ju-
vies Co.
B. Trin.
23 Jac.

Co. L. 153.

If a Recognizance or a Statute be to pay money at several days, it is good enough, and if the Comptor fail one day, Execution may be sued of the whole *STATUTE*.

Inst. 27
Eliz. 209.

Every Statute Staple or Merchant, not brought to the Clerk of the Recognizances within four Months next after the acknowledging, to enter a true Copy thereof, shall be void, against all persons, their Heirs, Successors, Executors, Administrators and Assigns only, which for good consideration shall after the acknowledging of the same Statute, purchase the Land or any part liable thereunto, or any Rent, Lease or Profit out of it.

(47) All the proceedings upon a Statute or Recognizance; and the manner and order of Execution thereupon.

The proceedings upon a Statute or Recognizance, to have the fruits and effect thereof, is not like to the proceedings in other cases of Suits upon Obligations and the like, to reduce them to Judgement; but as they are in their own nature much like to the nature of a Judgement, so is the proceeding and execution thereupon, much like to the proceeding and execution upon a Judgement: And therefore the Conusee may, if he please, bring an Action of Debt upon a Statute, and waive all other proceeding; or otherwise, if he like not this course he [or if he be dead, his Executor or Administrator, and if his Executor be dead, the Executor of his Executor] may as soon as the same is forfeit, have present Execution of it after this manner: He must bring his Statute to the Mayor and Clerk and other Officer, before whom it was acknowledged, and there if they finde the Record of it, and the day to be paid for the payment of the money, they are to apprehend and imprison the body of the Conusor, if he be a Lay person, and can be found within their Jurisdiction; and if he cannot be found there, they are to certify the Record into the Chancery, which also if they refuse to do, they may be compelled unto by a *Certiorare*: And if that Certificate be faulty, or execution be not done upon it by reason of the death of the Conusee or otherwise, the Conusor or his Executor, or Administrator, may have another Certificate; And thereupon, in case of the Statute Merchant, he shall have a Writ of *Capias* out of the Chancery, directed to the Sheriff of the County where the Conusor lives, to apprehend and imprison him (if he be not a Clergy-man) and this is to be returned in the Common Pleas or Kings Bench: And when the Conusor is taken, he shall have time for a quarter of a year to make his Agreement with the Conusee, and to sell his lands or goods to satisfy the Conusee: And for that purpose he may sell his lands or goods, albeit he be in prison, and his sale is good and lawful: And if in that time he do not satisfy the Conusee, or if upon the *Capias* the Sheriff return *non est inventus*, then by another Writ [or by divers Writs, if the lands or goods lie in divers counties] called an *Extendi Faciam*. And in the case of a Statute Staple, presently after the Certificate into the Chancery, the Conusee shall have a writ to take his body, and extend his lands and goods returnable in Chancery: And this Writ is a Commission directed to the Sheriff of the County where the lands and goods lie, for the valuing of the same, whereby all the lands, goods and chattels of the Conusor shall be appraised and valued at a reasonable rate by a Jury of sworn men, charged by the Sheriff for that purpose, which Inquisition so taken is to be returned by the Sheriff, and thereupon the lands, goods and chattels are to be taken into the Sheriff's hands, and by him to be delivered to the Conusee.

Certiorare.

Capias.

Extendi Faciam.
Quid.

Writ. Ac.
comit. 29.
Execution
in topo.
Bro. Stat.
tute in
toto.
Stat. Acton
Barnel de
Mercato-
ribus. 27
Ed. 3. c. 9.
F. N. B.
130. 131.
132. Dyer
180. 15 H.
7. 15. Co.
4. 67. 7 H.
7. 12.
Plow. 61.
62. 82. Co.
Super. Lit.
290. Stat.
23 H. 8. c.
6. 5 H. 4.
c. 12. 3 R.
3. 7. 14 E.
2. 11. Lit.
Bro. Scd.
294. 123.
226 Dier
299 Co. 5.
87. 4. 82.
59. 66.
Stat. 1 H.
6. c. 10.
Kitchin 166

Adjudge
Bathver
fue Wallis.
cul. 28.
Eliz. B.R.

Conusee, which the Sheriff may do if he will without any writ, so hold unto the Conusee untill he be satisfied his debt and damages. And if the Sheriff refuse so to do, the Conusee shall have a Writ out of the Chancery called a *Liberate*, to compell him to deliver to the Conusee the lands, goods, and chattels, so found by Inquisition, and taken into his hands upon the Extent, which the Sheriff need not to return: Or the Conusee may enter upon the land himself and take the goods out of the Sheriffs hand; and this Act of the Sheriff and Jury upon this Writ is called an Extent: And if the Jurors or Appraisors upon the *Extendi facias*, overvalue the lands or goods in favor to the Debtor, the Conusee hath no remedy but by motion in that Court where the Writ is returnable at the return day, or at least the same Term wherein the Writ is returnable, to desire that the appraisors may take the lands or goods at the rate they have valued them, in the same maner as the Conusee is to have them. But if the Conusee accept of the lands and goods from the Sheriff, or suffer the Term to pass wherein the Writ is returnable, he is too late, and hath no remedy at all. And if the Appraisors do undervalue the lands or goods in favor to the Debtee, it seems the Conusor hath no remedy at all, for he may at any time pay all or the residue of the debt and damages unlevyed, and have his land again if he please. And in case where the Inquisition or Extent taken and made, is insufficient, as if part of the land onely be extended in the name of all the lands, or it is found the Conusor dyed seised of land, and it is not said of what estate, or the like, the Conusee shall have a new extent, and this is called a Re-extent: and this he may have albeith the lands or goods be delivered to the Conusee by a *Liberate*, if the Conusee have not entred upon and accepted it, but if he once accept it, he can never after have a Re-extent: And when the Conusee is in possession of lands by such an Extent as before, then is he Tenant by Statute; and after the Conusee is once settled in peace in the lands extended, he shall hold it untill he be satisfied his debt, and his reasonable costs and damages for travel, suit, delay, and expence. But it seems the time shall not run out nor be said to begin untill the entry of the Conusee into the land; for if the land be extended and remain seven years without a *Liberate* made, yet he may have a *Liberate* at the end of the seven years; And as soon as the Conusee shall be satisfied his debt and damage by the goods and chattels of the Conusor, and by the ordinary and certain, or extraordinary and casual profits of the land, the Conusor shall have his land again: And for that purpose, if the Conusee refuse to give him an account, and to yield up his land to him the Conusor, howbeit he may not enter, yet may compell the Conusee thereunto by a Writ called a *venire facias ad computandum*, in the nature of a *venire facias*, by which the Conusor shall call the Conusee his *ad Computandum*.

Liberate
Quid.

Extent. *Quid*

Tenant by
Statute.

Venire facias
ad Computandum
Quid.

Executor.

Age.

Escape.

Executors or Administrators to account, and if upon the account, it shall appear he is satisfied, the Conusor shall have his land again; and if it appear he is over-satisfied, he shall answer the oversplus to the Conusor. But the Conusor may not enter upon the Conusee untill he hath brought this Writ, and made it thereupon to appear that the Conusee is satisfied. And if in case the Conusee be dead, his Executor or administrator may have execution of the Statute without any *Scire facias* upon the shewing of the Statute and the Testament in Chancery. And if the Sheriff return that the Conusor is dead, the execution shall be made of his lands only in the hands of his Heir or the Purchasor; but if the Heir be under age, the Execution cannot be done untill he be of full age: And if the Conusor dye in prison, the Execution shall be of his lands, goods, and Chattels: And if the Gaoler that hath him in prison suffer him to escape, he must answer the debt; And if it fall out that the Conusee, his Executor, or Administrator be ousted, or disturbed of his Execution by the Conusor himself, or any other during the time of the Extent, he may relieve himself against the disturber by Assise, or other Action, as another in the like case may do: And if he be rightfully ousted or disturbed by one that hath better right, as by one that hath a former Statute or the like, or by the Act of God, as by fire, water, or the like, in these cases the Conusee shall hold the land over after the time of his extent untill he be satisfied: But when it is through his own neglect onely that he is unsatisfied, as where the lands are delivered to him by the *Liberator*, and he after his entry into them make a conditional surrender of them, as if lands of the value of 10 l. by the year, be delivered to him in execution for 40 l. and he within four years make a conditional surrender of them to the Conusor, and after he enter for the condition broken, in this case he shall not hold the land over the four years, for he must take the profits upon his Extent presently; The proceeding in Execution of the Statute Staple, and the Recognizance founded upon the Statute of 3 H. 8. is after the same maner throughout as the proceeding in Execution of the Statute Merchant is, with these differences onely; That upon the Execution of the Statute Merchant there doth issue forth a *Capias* against the body before any Execution be to be made of the lands, or goods, and chattels, and the lands and goods cannot be extended until a quarter of a year be past after the body is taken, or the Sheriff have returned a *non est inventus*; but upon the Execution of the Statute Staple and the Recognizance, the body, goods, and lands may be taken together at the first; this therefore is a more speedy remedy then the former. Also upon a Statute Merchant one may have an Action of debt; but otherwise upon a Statute Staple; and the *Capias* upon the Statute Merchant may be returnable in the Kings Bench, or Common Place, but the

1521. 214.
F. N. 8.
130. 131.

The Writ of Execution upon the other is to be returned in the Chancery.

The proceeding upon the other sort of Recognizances are after another manner; for upon Recognizances at the common Law, if the money be not paid at the day, the Conusee, his Executor or Administrator is to bring a *Scire facias* against the Conusor, or if he be dead against his heirs when they be of full age; or if the lands the Conusor had at the time of entering into the Recognizance, be sold against the purchasers of these lands, which the Conusor had at any time after the Recognizance entered into, to warn them to come into that Court whence the *Scire facias* cometh, and to shew cause why execution should not be done upon the said Recognizance; and if the party or parties cannot be found to be warned, or being warned do not appear at the time, or appearing shew no cause why the debt should not be believed, then the Conusee shall have execution of a Moiety of his lands by *Elegit*, or if the Conusor be living, of all his goods by *Levari* or *Fieri facias* at his election, but he cannot have execution of his body unless he bring an Action of debt upon the Recognizance, or it be, by course of the Court, as it is in the Kings Bench upon a Bail, in which case a *Capias* doth lie.

Elegit.

Levari facias.

Fieri facias.

Capias.

The proceeding against the Sureties in Statutes shall be as the proceeding against the Principal; but in case where there are moveables of the Principal to satisfy the debt, the Surety (as it seems) Sureties shall not be charged.

When a man doth enter into a Statute or Recognizance, the land of the Conusor is not the debtor, but the body; and the land is lyable onely in respect that it was in the hands of the Conusor at the time of acknowledging of the Statute, or after; and the land is not charged with the debt, but chargeable onely at the election of the Conusee; but the person is charged, and the land is chargeable in respect of the person, and not the person in respect of the land. And therefore albeit the Conusor alien his land to another, yet he remains debtor still, and his body and his goods shall be taken in execution; and yet when execution is sued upon the land, the land is charged and become debtor also.

5. What things are subject and liable to execution upon a Statute or Recognizance. And when, and how; And what not.

The body of the Conusor himself, but not the body of his Heir, Executor, or Administrator, is lyable to execution and may be taken albeit there be lands, goods and chattels to satisfy the debt, and all the demesne and copyhold lands, tenements, and hereditaments, corporeal and incorporeal of the Conusor that are grantable over, as his Manors, Messuages, Lands, Meadows, Pastures, Woods, Rents, Commons, Tythes, Advowsons and the like: also all his goods, and chattels, as leases for years, wardships, emblements, cattel, household-stuff, and the like, are lyable to execution upon

First, in respect of the nature and quality of the things themselves.

Stat. 28.
815 Kew.
100. West.
2. Chap. 18.
1800. 120.
cution.
179 Co.
9 11 15
H 7 16
K 11 h.
117.

Stat. de
Mercato-
ribus.

Flow 73.
Co. 10.
1051. Bro
B. M.
chant.

Stat. de
Mercato-
ribus. Co.
3 12 Flow
73. Co. 1.
10 11.
1051.
Dyer 105.
Bro. Stat.
Merchant
44 Dyer
7 Co. 10.
per Lint.
174

And therefore if a man make a lease for life, or years, and after enter into a Statute, or Recognizance, this reversion *casu acciderit* shall be subject to execution, and the Conusor cannot (as it seems) by any sale thereof prevent it. And yet the contrary hath been held for law, *List. Broo. Stiff. 227.* * And if one make a feoffment in fee, or lease for life, reserving a rent, this rent is extendable and the Conusee may distrain for it. So if the lessee for life make a lease for years rendering a rent, and then the lessee for life enter into a Statute, this rent is subject to execution, and it seems the Conusee may bring an Action of debt against the lessee for years for it. And albeit the rent become extinct by the purchase of the Conusor or otherwise, yet as to the Conusee it shall be said to be in *ess.* and subject to execution still. And therefore if a rent be granted unto me for my life after the death of my wife, and after I doe acknowledg a Statute, and then my wife die, and then I release the rent to the Terre-tenant, this rent shall be lyable to execution. But Annuities, Offices in trust, Seigniories in Franckalmoign, Homage, Feaky, Rights, Things in Action, and such like things are not lyable to execution upon Statutes or Recognizances. Also a remainder in tail, or in fee, after an estate tail in possession, is not lyable to execution in these cases, except it happen to come into the possession of the Conusor.

Second, In respect of the estate property and possession of the conusor in the things.

The lands, tenements and hereditaments that are Copihold, albeit the Conusor have the fee simple of them, yet are subject to execution, onely for the life of the Conusor; but his demesnlands wherein he hath an estate in fee simple, are lyable to execution for ever if need require.

The lands the Conusor hath in joyntenancy with another, are subject to execution during the life of the Conusor and no longer, for after his death the surviving jointenant shall have all; but if the Conusor survive his Companion, then all the land shall be subject to execution: and the lands the Conusor hath as tenant in tail, are lyable to execution onely during the life of him, being the tenant in tail; for afterwards they shall goe to his issue in tail. And yet if the tenant in tail after he hath entered into a Statute, suffer a recovery of the land intailed, in this case the land shall be subject to execution as if it were fee simple land. And the lands the Conusor hath in the right of his wife, shall be charged and subject to execution onely during the lives of the husband and wife together, and no longer.

If a feoffment be made on condition to make an estate to another by a day of the same land, and before the day the lessee enter into a Statute or recognizance, this land shall be subject unto execution until the feoffor Re-enter, for the breach of the condition.

* Doct. & St. 53. Bro. St. Merch. 44. Dyer 205. Harringtons case. pasche 9. Jac. B. R. 60. 7. 38.

Dyer 7. Co. super. Lit. 374. Doct. & St. 51. Co. 2. 59. 1. 61.

Stat. de Mercatoribus Dyer 199. Plow. 82. Co. 7. 39. 3. 12. Broo. Recognizance 7. Co. 1. 61. 12 H. 7. 12. Broo Stat. Marchant.

Co. 1. 50.

If one be disseised of land, and then enter into a Statute; this land shall not be subject to execution: and yet if the Conusor do after recover the land by entry or Action, it shall be lyable to execution.

Stat. de
Mortuo-
ritu. Co.
2. 11. 42.
Plow. 524.
Co. 2. 171.
3. 90.
Diet 67.

The goods and chattels whereof the Conusor is solely possessed, and possessed in his own right, and the goods and chattels of which he is jointly possessed with another, and the goods and chattels he hath in the right of his wife, are lyable to execution. But the goods or chattels that he or his wife hath as Executor or Executrix to another, or as pledged onely, it seems are not subject to execution. And if the Conusor deliver goods to another to deliver over to J S, these goods before they be delivered over are lyable to execution. And if he have leases for years in the right of his wife, and die before execution be done, it seems these leases are lyable to Execution. *Sed quere.* But if the Conusor have goods in his custody of another mans, or have goods he hath distrained in the nature of a distress, these are not lyable to execution.

Co. 2. 12.
Stat. de
Mortuo-
ritu.

All the lands, tenements and hereditaments which the Conusor had at the time of the Statute or Recognizance entred into or at any time after, into whose hands by what means soever the same are betide and come at the time of execution, are subject and lyable to the execution. But the lands the Conusor had and did put away before the time of the Statute or Recognizance entred into, are not lyable to execution. And all the goods and chattels the Conusor hath and are found in his hands at the time when the execution is to be made by the *Extendifaciatur*, are lyable to the execution. But the goods and chattels he had and did *bona fide* do away before the time of execution done, are not lyable to the execution.

3. In respect
of the time.

Reo. Stat.
20. 48. 25.
Plow. 72.
See inf. 2.

And of all these things before subject to execution, the Conusor may take all or part at his pleasure. And therefore if the Conusor have sold his lands to divers persons, or have sold some of his lands to divers persons, or to one man, and keep the rest in his hands, or it descend to his heir, the Conusor may sue execution upon the lands in either of their hands at his Election; so that if the Cognissee after the Statute entred into, and before execution, purchase part of the land of the Cognisfor, he may notwithstanding have execution upon the residue in the hands of the Conusor, or in the hands of his heir; and yet so that in some of these cases his execution may be afterwards avoided, and he compelled to sue execution again.

4. In respect
of the quantity.

Weims. 2.
Chap. 12.
Plow. 72.
Co. 3. 12.
Diet 306.
Kilw. 100.

The Conusor upon other Recognizances shall have the same things in execution that a man shall have after a Judgment in a Suit in the Kings Bench or Common Pleas by *Fieri facias*, or *Levatus facias*, all his goods and chattels, and by *Seignioria* the Mors of

of his lands, and all his chattels, besides the Cattel of his plow and implements of husbandry. But in these cases he cannot take the body of the Conusor in execution, unless it be upon a new Suit, or in case of Bail in the Kings Bench.

6. Where a man shall have a Re-extent or new Execution, and where . . .

Howsoever by the Common-law after a full and perfect execution had by extent returned and of record, there shall never be any Re-extent, yet by a special Act of Parliament it is provided, That if after lands &c. be had in execution upon a just or lawfull title wherewith all the said lands &c. were lyable, tied or bound at such time as they were delivered or taken in execution they shall be taken or recovered away from him before he hath received his full debt and damages; in this case after a *Scire facias* had against the Conusor, his heirs, Executors, administrators or purchasers, he (or his executors or administrators if he be dead) shall have a new execution to levy the residue of the debt and damages then unsatisfied. Wherein these things are to be observed; 1. In case where the Conusee is unlawfully and wrongfully disturbed either by the Conusor or by a stranger, in the taking of the profits of the land delivered to him in execution; there he may and must bring his action and recover damages, and these damages shall go toward his satisfaction; for in this case and for this disturbance he shall not hold the land a day the longer. And where he is hindred by his own neglect or act in the taking of the profits of the land; as where his debt is 40 l. and he hath 10 l. a year delivered to him by which he may satisfy himself in four years, and within the time he make a conditional surrender to the Conusor, and enter for the condition broken; in this case he shall not hold the land over, neither shall he have any Re-extent. And where the let or disturbance is such as wherein the Conusee hath remedy given him by the Common-law to hold the land over after the disturbance removed; in this case he shall have no new execution nor Re-extent within this Statute; for where the Conusee hath remedy in *presenti* for part, or in *future* for all or part, this Statute extendeth not to it. And therefore where the Conusee is hindred in the taking of the profits of land by the act of God, as by fire, overflowing of water or the like; or the act of the party Conusor, or any by or under him, as when one is bound to *A* in a Statute of 100 l. and after to *B* in a Statute of 200 l. and *B* extendeth the land first, and then *A* extendeth the land and taketh it away from *B*, or when the Guardian in Chivalry doth put out the Conusee by reason of the Wardship of the Heir of the Conusor, or the wife of the Conusor doth claim her dower and put out the Conusee, or one disleise his leassee for life, or out his leassee for years, and then acknowledge a Statute, and after execution is sued against him, and then the land is delivered to the Conusee, and af-

Stat. 138.
B. chap. 3.

Co. 4. 64.
84. Plow.
62. 15 H.
7. 15.
Co. Super
Litt. 299.
Kitch. 116.

ter the lessee for life or years doth enter; in all these cases, because by the Common law the Conusee may hold over the land after the time given him by the extent, and after the impediments removed, untill he be satisfied his debt and damages therefore, he shall have no ayd of this Statute by Re-extent; for he is then only to be relieved by this Statute when as he is evicted and disturbed; and is wholly and clearly without any remedy at the Common-law.

2. Where the Statute saith [untill he &c. or his assigns shall fully and wholly have levied the whole debt and damages] if he hath assigned several parcels to several assigns, yet all they shall have the land but untill the whole debt be paid. 3. VVhere the words be [for the which the said lands, &c. were delivered in execution] if A disseisor convey the lands to the King who granteth the same over to A and his heirs to hold by Fealty and 20 l. rent, and after granteth the Seigniorie to B, B acknowledgeth a Statute; and execution is sued of the Seigniorie; A dieth without heir, and the Conusee entreateth and is evicted by the disseisor; in this case he shall have the ayd of this Statute; but the Perquisite of a Villain being evicted is out of the Statute. 4. Where the words be [delivered and taken in execution] yet if after the Liberate the Conusee enter (as he may) so as the land is never delivered; yet it is within the remedy of this Statute. 5. Albeit the Statute speak only of the recoverer, Obligee, &c. and not of their executors, administrators or assigns, yet the Statute shall extend to them.

6. Where the Statute speaks of a *Scire facias* out of the same Court, &c. if the record be removed into another Court and there affirmed, he may have a *Scire facias* out of that Court. 7. Where the Statute gives a *Scire facias* against such person or persons, &c. that were parties to the first execution, their heirs, executors or assigns &c. this must not be taken so generally as the letter is; for if the first execution were had against a purchaser, &c. so as nothing in his hands were payable but the land recovered: if this land be evicted from the tenant by execution, no *Scire facias* shall go against him, his executors &c. but if he hath other lands subject to execution, then a *Scire facias* lieth against him or his assigns but not against his Executor; neither in that case can he have a *Scire facias* upon this Statute against the first debtor or recognisor, but if there be several assigns of several parcels of lands subject to the execution, one *Scire facias* will lie against all the assigns.

A Statute or Recognizance and the execution thereupon may be discharged divers ways, as by defeasance, release, payment of the money, debt, and damages, or the residue thereof, or delivery up of the Statute, purchase of part of the land by the cognisor, or the like. And therefore if there be a defeasance to the Statute or recogni-

7. Where and by what means a Statute or Recognizance, and the execution thereof shall be discharged, suspended or avoided in all or in part, and where not.

and he be to pay money at a day, or to perform some other thing, and the money be paid, or the thing done accordingly, this is a discharge of the Statute. And therefore if such a Statute or Recognizance be afterwards sued against the Conusor, he may be relieved by an *Audita Querela*. And if *A* binde himself to *B* by a Statute of 201. and *B* sue execution, and the lands of *A* are delivered to him in execution until he levy the money, and after *B* doth make a defeasance to *A* by Indenture, that if *A* pay 101, by a day certain, that then the Statute or Recognizance shall be void; if this be done accordingly, the Statute and the execution thereupon is defeated and discharged. And if the Cognissee before execution or after, release to the Cognisor the Statute or Recognizance, or the debt; this is a perpetual discharge of the Statute and the execution thereupon. But if the Conussee before execution release to the Conusor all his right in or to the land; this will not discharge the whole execution; for if he may not sue execution of the land afterwards (as it seems he may this notwithstanding) yet he may sue execution of his body and goods. But such a release after execution made of the land, will no doubt discharge the land. And yet if a Conussee release all his right in the land to the Feoffee of the cognisor of a parcell of the land, it seems this will discharge the land of execution, albeit it be before the execution sued that this release is made. And so it is said it was resolved *Mich. 26. 27. Eliz.* If the cognissee assign the Statute or Recognizance to the Cognisor or to the terre-tenant, by way of discharge of the debt or land, it seems this is a good release and discharge of it in law. And if the Cognissee purchase any part of the land of the Cognisor after the Statute or Recognizance entered into; this is no discharge of the Statute or the Recognizance, but the Cognissee may have execution notwithstanding of the lands that are left in the hands of the Cognisor, or of his body, or goods, or all. But if the Cognissee purchase parcel of the lands and a stranger another parcel; in this case the lands that are purchased by the stranger shall be discharged of Execution. And if the Cognissee after execution sued, purchase any part of the land, or the Fee-simple of all or part of it doth descend to him; by this the whole execution is discharged. And if the Cognissee purchase all the lands of the Cognisor; by this the execution as to the land is suspended, but this is no discharge as to the body and goods of the conusor, for they are subject to execution still. And if the conussee reassign the conusor again, the execution may be revived again, against the lands of the conusor, so that they will be subject to execution again whether they do continue in his hands or be sold away to others. So also if the conussee

By Defeasance

By Release.

1. Cro. 41. 441.
Cro. 449.

By purchase
or surrender
of the land.

Co. Super
Lit. 76. 10.
47. 50. 94.
super 4. it.
265. Bro.
St. Mer-
chant 25.
See Re-
lease.

Barrow &
Graies
case. 38.
Eliz.

Plow. 73.
F. N. 104.
Lit. Bro.
Sect. 193.
11 H. 7. 4.
Br. audia
Querela.
49. Stat.
Merchant
42.

Co. Super
Lit. 190.
25. Aff. Pl.
7. Bro.
Stat. Mer-
chant. 25.
Lit. Bro.
Sect. 445.
5 H. 7. 25.

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Conusor sell a stranger and he doth purchase the land, and the stranger doth enfeof the Conusor, in this case also the Execution is revived, and the lands shall now be subject thereunto as they were before.

Harring-
tons case.
Palsch. 29
Jac. B. R.

If a Lessee for life make a Lease for years rendring a Rent, and after enter into a Statute to *IS*, and then enter into another Statute to *ID*, and after he doth grant his estate to *IS*; by this the Execution of the Statute made to *IS* is suspended and therefore during the suspension, it seems *ID*; albeit he be after in time, may sue and have the Rent in execution.

Flow. 73.
Co. 3. 12.
6. 13.

If the Conusor after he hath entred into a Statute or Recognizance doth convey away his land to divers persons and then the Conusor sue Execution of the Statute upon the lands of one or some of them and not of all; in this case he or they whose lands is or are taken in Execution, may by an *Assisa Querela* or *Scire Facias*, have contribution from the rest, wherein these differences must be observed, That one Purchaser shall have contribution from another: And therefore if the Conusor sell some lands to *IS*, and other lands to *ID*, and the Conusor sue Execution onely of the lands of *IS*; *IS* shall have contribution against *ID*. And the Feoffee of the Purchaser, the Feoffee of the Heir of the Conusor, the Feoffee of the Feoffee, and another Feoffee shall have contribution of the Heir of the Conusor: but the Conusor himself shall not have contribution from a Purchaser; and therefore if he sell part of his lands, and keep part in his hands, and the Conusor sue Execution onely of the lands in the hands of the Conusor or his Heirs; in this case neither he nor his Heirs shall have any contribution from the Purchasers; and one Heir shall have contribution from another. And therefore if one be seised of two Acres, the one in Burrow English, the other of other Land, and he enter into a Statute and dye, and he hath but two Daughters, and the Execution be sued upon the Land of one of them, she shall have contribution from the other. So where some land doth descend to the Heir of the part of the Father, and some to the Heir of the part of the Mother.

8. VVhere the Conusor, or his Heir, or an alienor, or purchaser shall have Contribution upon a Statute or Recognizance or not.

If one be seised of lands in Fee in the county of *A* and *B*, and enter into a Statute or Recognizance, and the Conusor dye, and then the Conusor dye also, and his Executor doth sue Execution of the Lands in *B* onely, and hath Execution, and after the Heir doth sell these lands, in this case the Vendee shall have no contribution. So also it seems the Law is, if the Heir sell the land to divers, and one of the Purchasers appear to the *Scire Facias*, and the Judgement is given against him, and he afterwards sell the land, his Vendee shall have no contribution. And in all these cases, where it is said the one Purchaser shall have contribution

2. Cro. 227. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

2. 476 hour
post and 1/2 p.m.

It is not intended that the rest shall give or allow him any thing by way of Contribution; but that the party whose Lands are extended, may by *Nulla Curia* or *Seire Facias*, as the case requirerth, defeat the Execution, and thereby shall be restored to all the mean Profits, and force the Comsee to sue his Execution upon all the Land, that the Land of every one of the Terre-tenants may be equally extended.

And so we fall from an Obligation by matter of Record, to an Obligation by matter of Fact which is no Record.

CHAP.

CHAP. XXI.

Of an Obligation.

Pinchell
49.

AN Obligation is a Deed in writing, whereby one man doth bind himself to another to pay a sum of money or do some other thing. And he that makes this Deed is called the Obligor, and he to whom it is made is called the Obligee.

1. Obligation
Quid.
Obligor.
Obligee.

Co. super
lit. 171.

And it is sometimes Simple or Single, which is when it is to pay a sum of money or do some other thing, and when it is without any Defeasance or Condition in or annexed to it, which also is sometimes with a penalty, called a Penal Bill, and sometimes without a penalty. And this is that which is most properly called an Obligation and sometimes also it is called a single Bill, or single Bond. And sometimes it is double or Conditional, which is when it is attended upon and accompanied with a Condition. And then it is said to be a Bond containing a penalty with condition to pay money, or do or suffer some act or thing, &c. And this condition is sometimes called a Defeasance, and then especially when it is (as sometimes it is) in another Deed or Instrument; for most commonly it is inserted into the same Deed wherein the Obligation being the other part of it is contained. And then also it is either subscribed under the Obligation, or included within the body of it, or indorsed upon the back of it. And *quacunque via* if the condition be performed the Penalty is saved; if not, the Penalty is forfeit.

2. Quatuplex.

Bro Obl.
21. 67. 30.
Fin. 40.
Hib. R. R.

An Obligation may be made upon parchment or paper, and in loose parchment or paper or in a peece of paper or parchment sewed in a book, and either way it is good. But if it be made on a Tally, piece of wood, or any other thing but paper or parchment, albeit it be sealed and delivered, yet it is void. And it may be made in the first or in the third person (notwithstanding the Statute of 38 Ed. 3 c. 4. which doth intend onely Obligations made beyond the Sea) And therefore an Obligation so made, as *Memorandum quod A de B debet C de D 10 l. in eujus*, &c. is good.

3. What shall be said a good Obligation in his original creation, or not.

First, for the manner and form of it; and what words are sufficient to make an Obligation

Diet 27.
21. 30.
Co. 9. 33.
21. 6. 9.
21. 4. 22.
21. 34.
21. 4. 30.
21. 7. 8.

Albeit the best manner and form of an Obligation is that which is most usual as, *Novimus me de B teneri & firmiter obligari C de D in 20 l. Legatis &c. Solvend. eidem C aut suo cert. Attornat. executoribus aut administratoribus suis. Ad quam quidem solutionem bene & fideliter faciendum debitor mi heredes, executores & administrators firmiter per presentes*, &c. yet any words in a writing sealed, whereby a man doth prove & declare himself to be bound to pay another man's money or to be indebted to him, will make

and delivered
have another
Good Obligation.
and

and therefore if a man by Deed say but this, *Memorandum* That I *A* of *B* do owe to *C* of *D* 20 l. to be paid at Easter next. Or *Memorandum*, That I *A* of *B* have had of *C* of *D* 20 l. of which there is 10 l. behind [or of which I owe him 10 l.] Or *Memorandum*, That I *A* of *B* have received of *C* of *D* 20 l. to be repaid him again. Or *Memorandum*, That I *A* of *B* do. grant to owe [or to pay] *C* of *D* 20 l. Or *Memorandum*; That I *A* of *B* do promise to pay *C* of *D* 20 l. Or *Memorandum*, That I *A* of *B* wil pay to *C* of *D* 20 l. Or *Memorandum*, That I *A* of *B* have had 20 l. of the money of *C* of *D*. Or *Memorandum*, That I *A* of *B* have borrowed of *C* of *D* 20 l. Or *Memorandum*, That I *A* of *B* do bind my self to *C* of *D* that he shall receive of me 20 l. All these and such like are good Obligations. So if one say *Memorandum*, That I *A* of *B* bind my self to *C* of *D* that he shall receive 20 l. by the hands of *IS* when *K* doth come to his house, and at Michaelmas then next following 5 l. this is a good Obligation, and the words [by the hands of *ID*] are void. So if one binde himself thus; *Memorandum*, That I *A* of *B* owe to *C* of *D* 20 l. for payment of which I bind my self and my goods: This is a good Obligation, and will binde the person but not his goods. So if one by Deed covenant or promise to do a thing, and then useth these words, *Ad quam quidem promissionem perimplendam obligo me* in 20 l. this is a good Obligation for 20 l. So if one binde himself thus; *Memorandum*, That I *A* of *B* am bound to *C* of *D* to deliver him 20 quarters of Corn by a day, *Ad quod performandum obligo me*, without more words, this is a good Obligation. So if one binde himself thus; *Memorandum*, That I *A* of *B* binde my self to pay *C* of *D* 10 l. at Easter, and if I fail to pay him then, I do grant to pay him 20 l. this is a good obligation for the 20 l. if he fail to pay the 10 l. And some say he may recover both the 20 l. and the 10 l. So if one binde himself thus; *Memorandum*, That in consideration of a Bill of 50 l. wherein *IS* is bound for me to *ID* for payment of 20 l. I do bind my self in 20 l. to the said *ID* to save him harmless from all Actions of the same; this is a good Obligation: and if *ID* sue *IS*, the Bill is forfeit. Or if one binde himself thus: Be it known, &c. That I *A* of *B* do owe unto *C* of *D* the sum of 14 l. to be paid at the Feast of &c. together with six pounds which I owe him upon Bills and Recognizances subscribed with my hand, this is a good Bill, but it is good for no more but the 14 l. and not for the 6 l. for the words do onely import the time of payment of the 6 l.

If one make a Writing in the form of a Statute, which the party doth seal, and afterwards legally deliver, but it is not sealed by the Kings and the Mayors Seal according to the Statute, albeit this be not a good Statute, yet it may be a good Obligation.

If one binde himself to pay money or do any other thing, and afterwards doth adde this clause in the Deed. *Et ad majorem hujus*

Bro. Obl.
gation 96.

Bro. Obl.
gation 26.

Bro. Obl.
52. Diet 6.

Bro. Obl.
401.
Bro. Obl.
79.

Foxe
case 9.
B. R.

Foxe
v. sus Wright
Trin. 40.
Eliz. 22.

Adjudged
Parret &
Wool-
wards case
M. 18. 39
El. in the
Exchequer
Chamber.

Trin. 27.
B. R. Trin.
Account.
79.

Prak. 26.
158. Trin.
Obligatus
171.

verificandum in iudicio A de B & C de D si quis sciet, quorum unusquisque obligatus sit in 198 & in solido, and these two do also seal and deliver the Deed; it seems this is a good Obligation to binde them, albeit there be no other words in the Deed.

Bro. Ob. 72
Crom. Jun.
69.

If an Obligation be made to I D to the use of I S, this is a good Obligation for I S in Equity, and some have said he may release it; but this is much to be doubted: for it is certain I S cannot sue the Obligor in his own name, but when he hath cause of Suit he may compel I D in Chancery to sue the Obligor.

Bro. Ob. 47
4 H. 8. 29.
21 Ed. 4. 46
4 Ed. 4. 29.

If A of B binde himself to C of D to pay 20 l. and say not when; yet the Obligation is good, and the money is due presently. So if the Obligation be *Solvendum nunquam*, or *solvendum* at Doomsday, the Obligations are good, and the *solvendum* void, and the money is due presently. So if A of B binde himself to C of D in 20 l. *Solvendum* A de B [where it should be *solvendum* C de D] the Obligation is good, and the *solvendum* void.

Dier 11.
Bro. Oblig.
19. 68.

If the Obligation be made thus [*Obligo me, &c.*] leaving out these words following [*heredes executores & administratores*] this is a good Obligation, and the Executors and Administrators, but not the Heir, are bound by it. And if it be made thus [*Solvendum* to the *Obligato & successoribus suis*] and not [*executoribus &c.*] this is a good Obligation, and the Executors and Administrators, and not the Successors, except it be in case of a Corporation, shall take advantage of it.

Co. io. 132
Fitz. Ob. 12
3 Hen 4. 14

An Obligation may be good, albeit it contain false or incongruous Latin or English, or Latin be put for English, or *à contra*, if the intent of the parties may sufficiently appear: And therefore if one be bound by the name of *Johannes* for *Johannem*; or one binde himself in *octoginta* for *octoginta libris*; or in *septuaginta* for *septuaginta libris*; in *viginti* for *viginti libris*; in seventeen for seventeen pounds, in *quingentis* for *quingentis libris*; in *septuagesimo* for *septuaginta libris*; in *sexingentis* for *sexcentis libris*; in *quingagesimis*, or *quinque decies*, for *quingaginta libris*: in *octoginta* for *octoginta libris*; or in *viginta livres* for *viginti libris*; in *viginti nobilibus* for 20 Nobles; or in *octoginta libris* for *octoginta libris*; or *quingenta libris* for *quingaginta libris*, or the like; these misprisions will not hurt the Obligations, for they are good notwithstanding. But if one by the Obligation binde himself in *quingagentis libris*, or in *quingagentis libris*, or in *quinagentis libris*, or in *secentis libris*; these Obligations are void: for in these cases the meaning is so uncertain, that it cannot be discerned, and no Averment will serve to supply it in this case. So if an Obligation be dated 23 *dis Aprilie* instead of *Aprilis*; this is a good Obligation, and this mistake will not hurt.

1 Adj. Judg'd
Vernon's
case, M. 13
Jac. Co. B.
m. Grayes
case 5 Jac.
B. R. M. 10
Car. B. R.
Adj. Judg'd.
Fitz. l. 11.
Bridges 3 & 4
Elix. Co. B.
Paris case
M. 4 Jac.
B. R.

Time 21
Ja. Nowells
case.

And if an Obligation have not date, or a false and impossible date,

date, or have but half the date, as the year of our Lord only; or if it containeth words, *in witness whereof*, or the like, if it be sealed and delivered it is a good Obligation.

Secondly, for the matter and substance of it.

A single Obligation may be to pay money, or to do any other thing that is lawful and possible, and such Obligations are good. But if the Obligation be to binde a man to do a thing unlawful or impossible, it is void. And therefore if one binde himself in an Obligation to kill a man, burn a house, maintain a suit, or the like, it is void. So if the Obligation be made for maintenance, or to that end, or if it be made pursuant to, and in execution of an usurious Contract, or the like, it is void. So if an Obligation be made against the Statute of 33 H. it is void. So if one binde himself in an Obligation, and the matter thereof is altogether uncertain, or insensible, it is void; but if there be any reasonable certainty in it, it is good enough. So if one binde himself to go to Rome in three days under pain of 20 l. this is void.

4. What shall be said a good condition of an Obligation, or not. First, for the matter and frame of it.

The condition of an Obligation may be either in the same, or in another Deed, and it may be indorsed of the back of the Obligation, subscribed under it, or contained within it; but the best way to make it, is the usual way, *viz.* The condition of this Obligation is such, &c. and yet if it be otherwise it may be good; for if an Obligation be made from A to B, and on the back of the same these words are indorsed [That whereas the within bounden A is bound to B in 20 l. yet B willeth and granteth, That if A pay to B 10 l. at Easter, that then the Obligation shall be void;] it seems this is a good condition. So if in the close of an Obligation of 20 l. these words be added [That if A (the Obligor) pay 10 l. to B (the Obligee) at Easter, that the Obligation shall be void;] this is a good condition. So if an Obligation be made from A to B of 20 l. and these words are subscribed [Now therefore if the Obligor pay 5 l. quarterly for four years, then it is agreed that the Obligation shall be void;] this is a good condition. So if a single Obligation be made from A to B of 20 l. and after the Obligation is made, B doth by another Deed grant, That if A pay him 10 l. at Easter, the Obligation shall be void, this is a good Condition or Defeasance. But if A do binde himself in an Obligation to B of 20 l. and after B doth binde himself in another Obligation to A to perform the Covenants of an Indenture; and in this second Obligation there is a Proviso, That B shall not sue upon the first Obligation till such a time; this is not a good Condition.

If A be bound to B in 20 l. with condition, That if B do not bring A a horse before Easter, that the Obligation shall be void; this is a good condition: and if the Obligee will have advantage of it, he must perform the thing: *Et sic de similibus.* So if A be bound in an Obligation to B in 20 l. with condition, that if B shall bring 20 load

Co. 19. 110.
See Faint on Deed.
num. 51.

See more infra.

Plow. 144.
21 H. 6. 51.
Fitz. Bar. 157.

Bro. ob. 11.
Fitz. Bar. 265.

Pafch. 11.
B. Simps-
ons case.
21 H. 6. 51.
36 H. 6. 9.

26 H. 4. 3.

Bro. consue.

of

of wood to the House of A. that A. shall pay him the 20 s. or that A. shall pay him 20 s. when B. shall bring him so load of wood to his house; these are good conditions, and the thing must be done before the money is to be paid.

Bro. Oblig.
42.

If the condition of an Obligation be, That if A. (the Obligor) do not pay to B. (the Obligee) *or* that the Obligation shall be void; this is a good condition; but it shall be taken according to the words; and therefore the Obligor is not to pay it: And if he be sued, he may plead performance of the condition in the not paying of it.

Caria B. R.
Jauche p. 7.
Jo. Trueman and
Parrams
case.

If these words be omitted in the close of the condition: [That then the Obligation to be void.] the condition is void, but it doth not hurt the Obligation, for that remains single: But if the next words, *viz.* [or shall stand in force] be omitted, the condition is never the worse; for as the addition of them doth nothing add to, so the omission of them doth nothing detract from the strength of the Obligation.

See in
West. Sym.

The condition of an Obligation may be to do any lawful or possible thing, as to pay money, deliver Goods or Cattel, acknowledge a Statute, enter into an Obligation, make a Release, make an Estate, surrender an Estate, make reparations for quiet enjoying, to save harmless, to defend a Title, to perform Covenants, to abide an Award, to perform a Will, to give so much land or money in Legacy, to purchase Lands, to appear in a Court, to marry another, not to sue, not to meddle with an Executorship, not to revoke a Letter of Attorney, not to be Surety, not to play at Cards or Dice, or any such like thing; and such a condition is good. So also it seems a condition that a man shall not sell his goods, is good: But when the matter or thing to be done by the condition is unlawful or impossible, or the condition it self is repugnant, insensible or incertain, the condition is void, and in some cases the Obligation also. And herein these differences are to be observed.

Secondly, for
matter and
substance of it.

Pach. 8. Ja.
Co. 8.]

When the thing enjoined or restrained to be, or not to be done by the condition, is such a thing in his own nature, as the commission or omission thereof is *malum in se*, there not onely the condition; but the whole Obligation also is void *ab initio*: And therefore if one be bound in an Obligation with condition that he shall kill a man, burn a house, do any other Felony, commit any Trespass, maintain any Suit unlawfully; or (being an Officer) that he shall take Fees by extortion, or that he (being a Sheriff, &c.) shall let a Prisoner escape, or that he shall save the Obligee harmless against an unlawful Deed, or that he shall not save his Land, or that he (being a Tradesman) shall not use his Trade (and yet it seems a condition that a man shall not use his Trade in one place, or at one time, or if he do that, he shall pay so much by the year unto another, is not

Against Law.

Co. 10, 101
1553.
super Lit.
306.
Dier 304.
Flow. 64.
Fitz Oblig.
13. See
before in
Condition
and in Co-
venant.

a condition against Law, as that a man being an Officer, and an Officer *pro bono publico* shall not exercise his Office or the like, this condition is void, and makes the Obligation and so the whole Deed void. But when the thing to be, or not to be done by the condition, is such a thing as the omission or commission thereof in its nature is not *contra ius*, but only against some maxim of Law, as that a man shall make a Feoffee to his own wife, or is but *malum prohibitum* only, as that a man shall erect a Cottage contrary to the Statute of 21. Eliz. or is repugnant to the State, as that a Feoffee of land shall not alien it, or take the profits of it, or that a Tenant in tail shall not suffer a Recovery of his Land, or the like, in these cases the conditions only are void, and the Obligations remain single and without a condition. And yet perhaps if the Obligors be sued upon these Obligations, they may have relief in Equity.

Equity.

Impossible.

2. When the matter or thing to be done by the Condition, is such a thing as in its nature is impossible to be done at the time of the making of the Obligation, there the Obligation is good, and the Condition only is void. And therefore if I be bound in an Obligation with Condition, That I shall stand to the award of certain persons, or provided that the award be made before the tenth day of May next, and provided that I have warning fifteen days before the tenth of May, and this Obligation is made the ninth day of May, this is a void Condition. And so if I be bound in an Obligation with condition, That I will go to Rome within three days, or that I will make an estate of white acre in Dale worth 10 l. per annum, when *revera* it is worth but 5 l. per annum, or that I will be Non-suit in such an Action, or assure such a piece of ground, when in truth there is no such Action or piece of ground, this Condition is void, and the Obligation remains single and good. So if the Condition be, That whereas A had a Judgment against B the Obligor for 20 l. and the Obligee hath acknowledged satisfaction, if therefore the Obligor shall before such a day get a Warrant from A, whereby the Obligee may be saved harmless for the same Acknowledgement, That then &c. this condition is void, and as it seems, the Obligation also, for that it is not only impossible, but against Law also. But when the thing to be done by the condition, is a thing possible at the time of the making of the Obligation and after by matter *ex post facto* by the act of God, the act of the Law, or the act of the Obligee, it is become impossible, in this case the Obligation and the Condition both are become void. And therefore if a man be bound with condition, That he shall appear the next Term in such a Court, and before the day the Obligor dieth, hereby the Obligation is saved. So if A be bound to B, that A shall marry Jane G. by such a day, and before the day B himself marry with Jane G. hereby the Obligation is discharged, and B shall never take advantage of it.

Perk. fed.
735.
Co. super
Lit. 207.
Fitz Oblig.
17. 27 H. 2.
19. 2 Ed. 2.
54. 42 Ed.
3. 6.

Hil. 17 Jac.
B. R.

Ed. 4. 59.

3. When

3. When the condition of an obligation is so insensible and incertain, that the meaning cannot be known, there the condition only is void, and the obligation good: As if an obligation be made by *A* to *B* with condition, that *A* shall keep *B* without damage against *IS* for 10 l. in which the Obligee is bound to the Obligor, this Condition is void, and the Obligation single. So if the Condition be, That *A* shall pay his part of the sums of money, that shall be levied for the trying of the customs of *M*; unless the word [levied] be used for taxed in that Countrey, the Condition is insensible and void. So if *A* be bound to *B* with condition to save him harmless, and say not for what, or against whom; this Condition is void, and the Obligation single: But if any sense or certainty may be made of it, the Obligation and Condition shall be both good.

False 9.
Jac. B. R.

Insensible.
Incertain.

2 H. 6. 44.
21 H. 7. 24.
30.

4. When the Condition of an Obligation in the matter of it is repugnant to the Obligation it self, there the Condition is void, and the Obligation good: And therefore if the Condition of an Obligation be, That the Obligee shall not have benefit by the Obligation, or that he shall not sue for the money in the Obligation, or the like; this Condition is void, and the Obligation single: And yet this day by a Defeasance made after the Obligation may be done.

See Defeasance.

Repugnant.

10 H. 6. 14
21 Ed. 4. 10
Trin. 7 Jac.
B. R.

5. When the thing to be done by the condition, is to be done beyond the Sea, it hath been held that the Condition is void, and the Obligation single, because the thing was not triable here. But it seems the Law is otherwise now, and that the matter is triable here and the Condition good. And in all other cases where a Deed in general is void for Misnomer, disability or otherwise, there an Obligation is void.

Not triable.]

Fitz. Oblig.
2. 11.

All Bonds with conditions for the enjoying of Spiritual Livings contrary to the Statute of 13 Eliz. Chap. 20. are void by the Statute of 14 Eliz. Cap. 11.

If any Ladies or Gentlewomen be drawn by flattery or threatening to enter into any Obligation simple or conditional, to pay any money not truly due, they may be relieved by a course in Chancery, for which see the Statute of 1 H. 6. cap. 39.

5. When an Obligation shall be void, for that it is made to another, & not to the Sheriff, or to the Sheriff in another manner then is appointed by the Stat. of 23 H. 6. ch. 10.

Stat. 23 H.
6. cap. 10.

No Sheriff or his Officers shall take any Obligation, by colour of their Offices of any person in their Ward, but only to themselves, and in the name of their Office, with condition with Sureties sufficient, and the prisoner shall appear at the day in the Writ. And all others taken in any other form shall be void. And persons that are in his Ward, by Execution, Condemnation, *Capias utlagatum*, Excommunication, Surety of the peace, or some other special case, being sent for by a Justice for Felony or the like, may not be bailed: and others that are Arrested on a *Capias* for Debt, or any

Judgment, or otherwise by Writ, Bill, or Warrant that are main-
 pernable, must be bailed. For the better understanding of which
 Statute, these things must be observed; That such Obligations as
 differ and vary from the form of this Statute in words and cir-
 cumstances onely are good, notwithstanding this Statute. And
 therefore if a Prisoner make an Obligation with a condition to ap-
 pear and answer in a Plea of Debt, and say no more, nor do let
 down the cause of the Debt, this is a good Obligation. And if the
 Sheriff take an Obligation with one Surety onely, or with two
 Sureties that are insufficient, or with two Sureties of another Coun-
 ty; this is a good Obligation. So if the Debt for which the party
 is Arrested be 30 s. and the Sheriff take an Obligation of 100 l.
 for his appearance; this is a good Obligation, for in these cases it
 is left to his discretion, and it doth concern him onely. So if the
 condition of the Obligation be for appearance *Menſe paſche*, omit-
 ting *proxime futurum*, yet it is a good Obligation. So if the
 party be Arrested by an Attachment out of the Star Chamber
 upon a contempt, and the condition of the Obligation is, that if
 the Obligee shall appear, and then, and there shall answer a con-
 tempt by him committed against the King and his Council, this is a
 good Obligation. And if the party that doth make the Obliga-
 tion be not in the Sheriffs custody, albeit the Obligation be made
 in any other manner Essentially differing from the form prescribed
 in the Statute, if it be not against the Common Law, it is a good
 Obligation. And therefore if when a *Capias in legatum* be deliver-
 ed to the Sheriff against a man, the Sheriff take bond of him for
 his fees and his travel; this bond if it be not within the Statute,
 yet it is against the Common Law; and therefore void, because it is
 by colour of Extortion. But where the Obligation, whether it be
 single or double made by a prisoner, doth Essentially differ by addi-
 tion, alteration or diminution from the form prescribed in the Sta-
 tute, there the Condition and Obligation both are void. And there-
 fore if such a Prisoner make an Obligation to any other besides
 the Sheriff, albeit he to whom it be made be called Sheriff, or if
 he make an Obligation to the Sheriff himself, and not by the name
 of his Office; or if he make an Obligation to him by the name of
 his Office, and doth not rightly name him, as if he make it to *J S*
vici comitis in Comitatu predicto, whereas it should be *de Comitatu*
predicto; all these Obligations are void by this Statute. And if the
 Sheriff take an Obligation of a Prisoner for his appearance, in case
 where he is not bailable by the Statute, and so let him go free; or
 if he take an Obligation of a Prisoner that is bailable for his ap-
 pearance, and doth insert other things into the condition, as to pay
 money for meat, drink or fees, or the like, or if he deliver a man
 in Execution, and take bond of him to save him harmless, or to
 be

Villars
 case, M. 9.
 Jac. B. R.

Co. 10. 101.

Villars
 case.

D. 11. 364.

Ant. 11.
 case, Hil.
 7 J. C. Co.
 B.

Co. 10. 101.

Nowels
 case, Trin.
 21 Jac. Cu-
 ria.

be a true prisoner; all these and such like Obligations as these are void by the Statute. If a man be a prisoner in Ludgate upon a *Capit*

Dier. 118. *at ut legatum*, and the Goaler take an Obligation of him with two
119. Sureties, with condition to save him harmless, and to discharge his Fees, and to yield his body at all times upon Summons, &c. this is a void Obligation, as well against the Sureties as against the Principi.

Dier. 324. pal. If the under-Marshall of the Kings Bench take an Obligation of one in Execution and a stranger, with condition to save him harmless of all escapes, and so suffer the prisoner to go at large, this is a

Plow. 61, 62. void Obligation. If the Sheriff of Bedford, having a prisoner by force of an Execution, let him go at large, and take an Obligation of him, with condition that he shall keep the Sheriff without damage against the King and the Plaintiff, and be at all times at the commandment of the Sheriff as a true Prisoner, and appear before the Justices of the King at *Westminster*, &c. this is a void Obligation.

Fitx. obl. 4. If a man be a prisoner to the Sheriff for suspicion of Felony, and after a Writ comes to him to have all his Prisoners at a certain day before the Justices of Goal-delivery of the same County, and thereupon the Prisoner doth make a single Obligation to the Sheriff to appear before the Justices the day of the Writ; this is a void Obligation, because it is single and not with condition. And if the Sheriff bail not one bailable by a single Obligation, it seems this is a void Obligation.

10 H. 7. 1. A single Obligation is always taken most in advantage of the Ob-
16. lige and against the Obligor, but it is otherwise of the condition of an Obligation, for this is always taken most in advantage of the Obligor, and against the Obligee.

6. How a single Obligation shall be taken.

Dier. 19. If two, three, or more binde themselves in an Obligation thus, *Obligamus nos* and say no more, the Obligation is and shall be taken to be
340. joyn't only and not several; but if it be thus *Obligamus nos & alterum*
Co. 5. 119. *que nostrum*; or *obligamus nos & unumquemque nostrum*; or *obligamus nos & quilibet nostrum*; or *obligamus nos & alterum nostrum*; in all
9. 53. these cases the Obligation is both joyn't and several, so as in these cases
Old N. B. the Obligee may sue all the Obligors together, or all of them apart at
61. his pleasure, but it seems he may not sue some of them and spare the
E. o. Joyn. rest, but he must sue them all together, or all apart by several *precipes*,
trans. 4. and in this case he may have several Judgements and several Executions
16. against the obligors, and take their bodies in execution, but he shall have satisfaction but once, or from one of them onely, for after he hath been satisfied by one, the rest shall be discharged. But in the first case where the Obligation is joyn't and not several, the Obligee must sue all the Obligors together, for he cannot sue one alone with effect without the rest, unless it be in some special cases as where one of the Obligors alone doth seal the Deed, or where all of them doth seal, but one of them is as an Infant, a woman Covert, a Monk, or the like.

Joyn't and several.

like, or where one of them is dead, for in these cases one or some of them may be charged without the rest. But otherwise the Plaintiff cannot proceed in his suit against one, or some of them without the rest, except the Defendant give him advantage, for howsoever the Suit be well begun, for when one or some of them alone is, or are sued, it shall not be intended that the rest are living, untill it be shewed by the other party, yet the Defendant is not bound to answer, unless the rest be sued also; and therefore in this case he or they that is or are sued alone, are thus to take advantage of it, viz. to shew the matter to the Court, and to plead in abatement of the Writ; for if he appear and shew it not, but plead *non est factum*, or the like to the Obligation, the Jury must finde against him, and he will be charged with the whole debt. And so also if one appear and the other make default and is outlawed, it seems he that doth appear must answer all.

Hill. 19 Ed.
B.R. ad-
judged.

Executors.

Executors and Administrators shall be bound by the Obligation of the Obligor, albeit they be not named: but the Heir of the Obligor shall not be bound by the Obligation, unless he be named in the Obligation, viz. *Obligo me heredes, &c.*

Dier 14. 39

Heir.

If an Obligation be made to one and his Heirs, or to one and his Successors, the Executors and Administrators, not the Heir or Successor, shall take advantage of it.

See before.

If one binde himself in an Obligation of 200 l. to *A* and *B* *solvendum* 100 l. to *A* and 100 l. to *B*, and *A* die, it seems the Executors of *A* shall have 100 l. but that *B* shall have the whole 200 l. *sed quare.*

Dier 390.

For the time
of payment.

If one binde himself by Obligation to *IS* to pay him an 100 l. when *K* doth come to his house and at Michaelmas then next following 100 l. more; Michaelmas then next following shall be taken for next following the making of the obligation, and not next following the coming of *K* to his house.

Bro. ab. 39

If one binde himself to pay money upon a single obligation, and doth not say when; in this case it must be paid presently.

Dier 128.
per 3. Just.
Trim. 22 Ja.

If one bind himself by obligation to pay money at Michaelmas, and doth not say which Michaelmas, this shall be taken for Michaelmas next after the date of the Obligation; and so also it shall be taken in the condition of an obligation.

Co. M.
Curia in
the Mar-
ches of
Wales Tr.
8 Car.
Agree M. 9
Ja. B.R.

7. How an Ob-
ligation with
a condition, or
the condition
of an Obliga-
tion shall be ta-
ken, and how
it must and
ought to be
performed.

If one binde himself to pay 20 l. in the year of our Lord which shall be 1599. in and upon the thirteenth of October next ensuing the date of the obligation; this shall be taken to be due the 13. of October, 1599. and not next after the obligation. See more *infra*.

Hill. 39 Ed.
B.R. Shar-
plus vers.
Hacking-
ton.
Dier 14. 52.

The condition of an obligation when it is doubtful, is always taken most favorably for the Obligor, in whose advantage it is made, and most against the Obligee, yet so as an equal and reasonable construction be made according to the minds of the parties, albeit the words found to a contrary understanding.

If.

Perk. 64.
385.

If something be by a condition to be done, and it is set down indefinitely, and not set down who shall do it, if the Obligee hath more skill to do the thing then the Obligor, it shall be done by him; otherwise it shall be done by the Obligor: as if a Tailor be bound to me in an Obligation with condition, that if I bring him three yards of cloth which shall be measured and shaped, and if he make me a Cloak of it, &c. and it is not said by whom it shall be shaped, this must be done by the Tailor.

First, in respect of the persons that are to do the thing.

Ca. super
11. 202. 2.
p. 80.
204. 4. 22.
311. 7. 10.

If the condition of an Obligation be to pay money, or to do any other transitory act to the Obligee himself, and no time is set for the doing thereof, but a place onely; this regularly must be done in convenient time, and that without request. So also in case where the thing to be done is in its nature local, but yet such a thing as may be done in the absence of the Obligee, and without his concurrence, as to acknowledge satisfaction on a Judgement, make a Lease for years, or the like, it must be done in convenient time and that without request. So also in case where the thing to be done is local, and the concurrence of both parties necessary thereunto, yet when it is to be done to a stranger and not to the Obligee, as if the condition be that the Obligor shall make a Feoffment to *I S*, it must be done in convenient time without request. But where the thing to be done is local, and the concurrence of both parties necessary thereunto, and the act is to be done by the Obligor himself, or by a stranger to the Obligee himself, as where the condition is that the Obligor, or a stranger shall infeof the Obligee; in this case the Obligor, or the stranger shall have time to do it during his life, unless the Obligee do hasten it by request; and if he request it sooner, then it must be done in convenient time after request made. And yet if the thing to be done, be to be done wholly by the Obligor, or a stranger, and doth nothing concern the Obligee, as where the condition is that the Obligor shall go to *Rome*, or that *I S* shall preach at *Pauls Cross*, or the like; in the first case it may be done at any time during the life of the Obligor, and in the last case it may be done at any time during the life of *I S*; and request in this case shall not hasten it.

Secondly, in respect of the time when the thing is to be done.

Ca. 80.
11. 202. 2.
p. 80.
204. 4. 22.
311. 7. 10.

If an Obligation be with condition to grant a Rent, or an Annuity to the Obligee during his life, to be paid at Easter, and no time is set for the doing of it, this Rent must be granted before Easter next after the Obligation, or else the Obligation will be forfeit. And if the condition be to grant an Advowson, and no time is set for the doing thereof, it must be done before the Church become void, or otherwise the Obligation shall be forfeit.

Bar. 77.

If the condition be to do a thing upon a day in the year and there be two days of that name in the year; in this case it seems it must be done that day that is furthest off from the time of making of the

the Obligation, especially if that day be the more notorious of the two days.

If the Condition be to pay 10*l* the Eleventh of *May* next following, and the Obligation is dared the Fifth of *May*; in this case the money must be paid the Eleventh day of the same month of *May*, and not of the next month of *May*. A djudg. M. 20 Jac. B. R. Precon call

If the Condition be, To stand to the Award of *I S*, and *I S* Award money to be paid, but set no time for the payment of it; this must be paid in convenient time, else the Obligation shall be forfeit. 3 Ed. 4. 31

If one be bound to me in an Obligation with condition: that if I enfeoff him of white acre, he will pay me 10*l*; but doth not say when, this must be done as soon as I make him the Feoffment. So if one be bound to me that if the goods I have delivered to *B* shall be lost, that *C* shall satisfie me for them, and doth not say when; this shall be presently after the losing. Peru. Sed. 797. 798

If the Condition be to pay *I S* money when he shall come to the age of one and twenty years, in this case it must be paid the very day *I S* doth come to his full age, and paymen. after is not sufficient performance of the Condition: M. 2 Jac. B. R. Cruise. det. Mort. case.

If the condition be, to come at a day to such a place to do a thing, and the thing cannot be done without the concurrence of the other party; in this case the Obligor must stay for the very last instant of the day for his coming; and it seems also he must stay at the place all the day long. 39 Eliz. B. R. Fitch. bar. 92.

If the Condition be, To pay a Rent at Michaelmas, or within 20 days after, the Obligation is not forfeit before the 20 days be past. A djudg. pal. 19 Ed.

If one be to do a thing on a day certain, he may do it any part of the day whiles the light doth last: And if the Condition be, To do a thing by, or before a day, it may be done the last instant of the day before and it is sufficient. Bro. Condition 146. Dier 17. 7 Ed. 4. 1.

3. In respect of the place where the thing is to be done.

If the Condition of an Obligation be, To pay money, or do any like transitory act to the Obligee on a day certain, but no place is set down where it shall be done; in this case it must be done to the person of the Obligee wheresoever he be; and for this purpose, the Obligor must at his peril seek out the Obligee, if he be *infra quatuor mias*, otherwise the Obligation is forfeit; but if the Obligee be not within the Kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the Obligation forfeit for not doing of the thing. So if one grant an Annuity to another, and doth not set down where it shall be paid, and gives a Bond with Condition for the payment thereof; in this case it must be done to the person of the Obligee where ever he be: And the like Law is as it seems, where the thing to be done by the condition, is to be done by or to a stranger: But when the thing the party is bound by the condition to do is local, he is not bound to go any further Peru. Sed. 790, 791. 7 Ed. 4. 4. 22 Ed. 4. 35. Lit. Sed. 240, 341.

ther, or to any other place, but to the place it self: And therefore if the condition be to make a Feoffment of a piece of Land, the party that is bound to do it, is not bound to go to any other place, but to the piece of Land to do it: And if a man make a Feoffment in Fee, or Lease for life or years of Land, rendring rent generally, and gives an Obligation with condition for the payment of the Rent, the Feoffee or Lessee is not bound to go to any place from the Land, to seek the Feoffor or Lessor to pay him this rent.

If the condition be to deliver twenty quarters of corn such a day to the Obligee, and no place is set down where it shall be delivered; in this case it is sufficient, if the Obligor when the corn is ready, do give notice thereof to the Obligee, and to wish him to appoint a place whereunto the Obligor may bring it, and if he refuse to appoint a place, it is at his own peril; or the Obligor may bring the corn to the house of the Obligee (and this is the safest way) and if the Obligee refuse it, the condition is performed, and the Obligation is discharged.

If the condition be to perform all the Covenants in an Indemure; this shall be taken as well for the Covenants in Law as for the Covenants in Deed.

4. In respect of the thing it self to be done

If a Lease be made of a Manor excepting a Close, and the Lessee make an Obligation to the Lessor with condition, that the Lessee shall perform *omnia & singula in scripta prædicta contenta*; by this the Close shall be taken to be within the condition, so that if the Lessee disturb the Lessor in the Close excepted, this shall be a breach of the condition.

If the Condition be, to make a Feoffment to the Obligee of Land; in this case the Feoffment may be made with, or without writing, Feoffment, and if it be made by writing it may be made without any Warranty, Lease, &c. or Covenants, and this will be a sufficient performance of the condition.

If the Condition be, That the Obligor shall make a Lease to the Obligee for twenty years, and it is not set down when the Lease shall begin, it shall begin presently.

If the Condition be, That the Obligor shall do any Act upon request that the Council of the Obligee shall think reasonable; as for example, shall do any Act, &c. for the releasing of an Obligation wherein the Obligee is bound to the Obligor, and the Obligee by advice of Council devise and requesteth a Release of all demands to the Obligee, and so Act; in this case the Obligor may refuse to seal it, albeit it be devised by the Council of the Obligee, because it is unreasonable, for it must be a reasonable act that the Obligor by this condition is bound to do.

If the Condition be, To pay to /, at Michaelmas next, and to / yearly after, until / S be made Knight; in this case albeit / S be ney or Rent, made

To make a Release or other Assurance.

To pay money

Perk. Sec.
151

Co. 4. 80.
Dist. 257.

Nov. 6.

See Cov. 12.
Dist. 6.

Co. 4. 31.

Dist. 218.

Adjudge.
Dist. 29 El.
Co. 3.

made Knight before Michaelmas, yet the first 10 l. at Michaelmas must be paid.

If the condition be thus, That if the Obligor shall for ever pay yearly to the Obligee, &c. 10 l. at the two usual Feasts by equal portions, or if his Heirs shall at any time hereafter pay 100 l. at one payment to the Obligee; that then the Obligation to be void; in this case albeir the Obligor hath election, which of these two things to do; yet because the intent is apparent that one of these things should be done, if therefore the 100 l. be not paid before the first feast, the 10 l. must be paid yearly.

To warrant land and for quiet enjoying.

If the condition of an obligation from A to B be thus: That whereas A hath sold to B certain Meadow in Dale, that the said A shall warrant the same against Lord and King and all others, if the said B shall peaceably enjoy it to him, and his Heirs of the Lord of the Manor of M, by the services due after the custom, &c. in this case the substance of this being for quiet enjoying, it shall be extended that way, and albeir it be not said what he shall warrant, yet it shall be taken the Land in question, and the Warranty shall be construed to last onely for the life of B, and not to extend to any new Titles after the Covenant, especially such as are by the act and default of the Obligee himself, as if he commit a forfeiture, and the Lord enter or the like.

To prove a thing.

If the condition be, That the Obligor shall sufficiently prove such a thing, this shall be taken for proof by enquest, and accordingly it must be done: But if the condition be that it shall be done by such a time, or before such persons as when or where such proof cannot be had, then it is otherwise. Where the word [proof] is put generally, it shall be understood of proof by Justice; but when the parties agree upon another form of proof, that shall prevail against that which is but instruction of Law.

To suffer his wife to make a Will.

If one be bound in an Obligation with condition to suffer his wife to give to her kinsfolks, children or others, portions of his goods to the value of 100 l. and that he will perform it, and she give part to one and part to another, in this case the Husband must perform it accordingly: But if the condition be to suffer her to give to A and B 100 l. and that he will perform it, and she give 100 l. to A he is not bound to perform this.

If the condition be, That he shall perform his wives Will, so it do not exceed 20 l. and she make a Will and devise 100 l. in this case he is not bound to perform the Will for the 20 l.

In respect of the manner and order of doing the thing and other matters.

If the condition of an obligation be, That the Obligor shall infeof the Obligee, and such others as he shall name by a day, in this case the Obligee must do the first act, viz. name the others; otherwise the Obligor doth not forfeit his obligation by the not doing of it: But if the condition be to infeof me, or such others as I shall name

Adjudge. 18 J. A. R.

Harbert ver. Rockey.

Dier 42. 11

Perk. folio 791. 1024. 4. 11.

Gold's case in Harlens Rep. 137.

Curia 79 J. A. Co. B.

Adjudge. Hil. 7 Jao. B. 11.

Kelw.

name before such a day; in this case if I do not name others, it seems he must enfeoff me before the day at his peril.

Co. 5. 25.
7 Ed. 4. 13.
Perk. Sec.
771. If the Condition be, That the Obligor shall make such an estate of Lands as I S shall advise, I S must first advise, and this must be made known unto the Obligor, ere he is bound to do any thing; and if he never advise, he is never bound to do any thing; for it is in this case, as if one be bound to stand to the Award of I S, and I S never make any, or make a void Award, which is all one.

Co. 5. 21. If the Condition be, To make such a discharge in such a Court as the Obligee or his Counsel shall advise; in this case the Obligee must do the first act, viz. advise, and give notice of the advise to the Obligor before he is bound to do any thing. But if the Condition be, to make such a discharge in such a Court such a day, as the Judge of that Court shall advise; in this case the Obligor must at his peril procure the Judge to advise a discharge, and it must be done that very day, or the Obligation will be forfeit.

Per Ju. Nichol.
M. 13 Jac.
Co. 8. If the Condition be, To pay 20 l. to the Obligee when he doth come to London; in this case the Obligee must do the first act, viz. make known to the Obligor when he doth first come to London, for otherwise it seems the Obligor is not bound to pay the money.

Co. 5. 127.
Dier 171. If the condition be, That the Obligor shall levy a Fine to the Obligee before such a day, the Obligee must do the first act, viz. sue out the Writ of Covenant.

21 Ed. 4. 52. If the Condition be that the Obligor shall deliver twenty Clothes to the Obligee such a day, the Obligee paying for every Cloth immediately after the delivery 20 l. in this case the Clothes must be delivered, albeit the Obligee refuse to pay the money; but if [immediately after] be left out, it seems the Obligor is not bound to deliver the Cloth unless the Obligee first pay the money.

Co. 1. 3. 4.
Dier 937. If the Condition be, that the Obligor and his Heirs shall at any time upon request made, do any act, &c. that the Obligee shall require, &c. and the Obligee tender a Release or other Deed to seal in this case, if the Obligee or his Heirs that is to seal the Deed, be an illiterate man, he may refuse to seal it until he can get some body to read it unto him, but he may not refuse or delay to seal it until he can have a Lawyers advice upon it, but he will forfeit his Obligation.

Perk. Sec.
771. Co. 5.
21. If the Condition be, To do any thing upon request, the Obligor until request made is not bound to do any thing towards it, neither can he forfeit his Obligation til then. And yet if in this case the Obligor disable himself to do the thing he hath undertaken to do upon request before the request made; the Obligation may be forfeit without any request made.

If the condition be, That the Obligor shall within a certain time ^{14 H. 2.} surrender such land of his for an Annuity of so much as they shall agree upon, and they agree upon 10 l. *per annum*; in this case the Obligor is not bound to make the surrender until the Annuity be made and tendred unto him.

If the condition be, To deliver to the Obligee an Obligation wherein the Obligee is bound, *&c.* or to seal and deliver to the Obligee such a Release of it as shall be devised by the Council of the Obligee before Michaelmas, and the Council do not advise any Release before Michaelmas; in this case the Obligor is discharged of the Obligation, for the Obligee is to do the first act. ^{Hil. 37 El. Co. B. Greeng. hams case adjudg.}

If A. be bound to B. in an Obligation with condition, That A. and his wife shall levy a Fine of land to C and D and their Heirs, and at their costs and charges; this shall be construed to be at the costs of the Obligor, and not at the costs of the Conusees; but if the word [and] be omitted, perhaps it may be otherwise. ^{Trin. 4 Jac. B. R.}

If the condition be thus, That if the wife die before Michaelmas without issue of her body then living, that the Obligation shall be void; in this case [then living] shall relate *ad proximum antecedens*, and not to the death of the wife; and therefore if she hath issue and die, and after before Michaelmas the issue dieth also, the Obligation is void. ^{Dier 17.}

If the condition be, That if the Obligor shall waste the goods of the Obligee (his Master) and this waste within three Moneths after due proof of it, either by confession or otherwise be notified to the Obligor, that the Obligor shall satisfy the Obligee for it, and the Obligor do confess the waste under his hand and seal; in this case it seems this proof, though it be extrajudicial, is sufficient. ^{Gold's case. M. 13 Jac.}

Conditions
Impossible.

When the condition of an Obligation is to do two things by a day, and at the time of making of the Obligation both of them are possible, but after and before the time when the same is to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the Obligee himself; in this case the Obligor is not bound to do the other thing that is possible, but is discharged of the whole Obligation. But if at the time of the making of the Obligation one of the things is, and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the Obligor, or a stranger, the Obligor must see that he do the other thing at his peril. And when the condition of an Obligation is to do one single thing, which afterwards before the time when it is to be done doth become impossible to be done in all or in part, the Obligation is wholly discharged; and yet if it be possible to be done in any part, it shall be performed as near to the condition as may be. ^{Co. 5. 22. Super Lit. 307. Dier 462. 25 H. 7. 2. 4 H. 7. 4.}

If

221. 2. 1. If the condition be, To do one of two things, as to make a Feoffment to me, or pay me 20 l. in this case if the Obligor do either of them; it is sufficient. But if the condition be in the copulative, as to enfeoff me and pay me 20 l. in this case the doing of one of them will not suffice, but he must do both.

Per Justice
Doddridge
M. 2 Car.
B. R.

If the condition be, To pay to A B and C 30 l. a piece within a week after they come to 18 years of age, or within 40 days after their days of Marriage, after notice given thereof, which shall first happen; in this case this notice must go to both the parties, so that notice must be given when they are 18 years of age; otherwise, and until notice given, it seems the Obligor is not bound to pay the money. See more in *Condition num. 8.* and *Covenant num. 6.*

The matter of a condition of an Obligation is sometimes affirmative and compulsory, and doth consist of something to be done; and sometimes it is negative and restrictive, and doth consist of something not to be done; the not doing in the first case, and doing in the latter case, causeth the Obligation to be forfeit; and the doing in the first case, and not doing in the latter, saveth the Obligation.

Co. super
lit. 107.
Plow. 67.
17 Ed. 4. 3.

If one be bound in an Obligation to me, with condition to enfeoff me of land, and the Obligor do first make a Lease to me of it, and afterwards he doth make a Release of it to me and my Heirs; this is a good performance of the condition.

Perk. sect.
984.
Fitz. Bar.
81.
Perk. Sect.
758.
15 Ed. 4. 5.

If a condition be to make me a Feoffment of land, and he tender me a Feoffment, and I refuse it; by this the condition is performed. So if the condition be, To make a Feoffment to my use, and when it is made I refuse it, this is a good performance of the condition. But if a man bind himself in an Obligation to me, with condition to make Feoffment to a stranger, and he tender the Feoffment to the stranger, and he doth refuse it, this is no good performance of the condition, but the Obligation is forfeit. If the condition be, To enfeoff me and my wife, and he tender it to me, and I refuse it; it seems this is a good performance.

8. When the Condition of an Obligation shall be said to be performed and the Obligation saved. Or not. To make a Feoffment.

9 H. 7. 4.
4 H. 7. 4.
Perk. Sect.
757.

If one binde himself in an Obligation to me, with condition to make me a Feoffment of the Manor of Dale by a day, and he before the day grant a Rent-charge out of the same Manor to a stranger, and afterwards and before the day also, he doth make me a Feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. But if the Obligor sell away part of the Manor before, or make a Feoffment to me but of one moiety, or a third part of the Manor; this is no good performance of the condition. And if in this case the Obligor before the day take a wife, and before the day make his Feoffment according to the condition, but the Marriage doth continue until after the day; in this case it seems the condition is broken.

Tender and Refusal.

Acceptance.

If the Condition be, That the Obligor shall enfeoff me of the Manor of Dale, and he make a Feoffment of the Manor of Sale, and I accept thereof; it seems this is no performance of the Condition, and that my acceptance in this case will not help. So if the Condition be, To make me a Feoffment of land, and he give me money, a horse, or the like, in recompence of this, and I accept thereof; this is no good performance of the condition: And the like law is in all cases where the Condition is to do any collateral thing, as to account, build a house, enter into a Recognizance or the like, and the Obligor doth give, and the Obligee accept some other thing in lieu thereof: And so also it is where the Condition is to make a Feoffment to a stranger, and the Obligor give, and the stranger take another thing in lieu thereof. But if the condition be to enfeoff me of land such a day, and he make, and I take the Feoffment before the day, this is a good performance of the condition.

If the Condition be To enfeoff me or my Heirs in the disjunctive, and the Obligor enfeoff me and my Heirs: this is a good performance of the Condition; for it is impossible to enfeoff my Heirs while I live: and when two things are to be done by a condition, whereof the one is possible at the time of making the Obligation, and the other not; in this case it is sufficient if he do the thing which is possible.

If the condition be, To make me a Feoffment, or pay me 20 l. if the Obligor do either of them, it is sufficient. But if the condition be, To enfeoff me, and pay me 20 l. in this case the Obligor must do both, or the condition will not be performed, *Et sic de similibus*.

To make an Estate.

If the condition be, That the Obligor shall make me a sufficient estate of land by the advise of W and S, and they advise an insufficient estate, and the Obligor do make the estate according to that advise, this is a good performance of the condition: But if the condition be, That the Obligor shall make a good and sure estate, and he by advice of Council make an estate that is not good and sure; this is no good performance of the condition.

If the condition be, That the Obligor shall make me an estate of land, and make the estate to another by my appointment; it seems this is no performance of the condition.

If the condition be, That the Obligor or his Feoffees in trust shall make an estate to the Obligee such a day, and the Feoffees do it without the consent of the Obligor; this is no performance of the condition.

To make further assurance.

If the condition be, To make further Assurance, and the Obligor make further Assurance upon condition, without the agreement of the other party; this is no good performance of the condition.

To save harmless.

If the condition be, To save me harmless from an Annuity where-with my land is charged, and the Obligor doth pay the same yearly, and

And if I be an Assignee for the same from the party, this is a good performance of the condition. But if the condition be so to charge me of such an Annuity, in this case payment and procuring me a Release, is no good performance of the condition.

Perk. Sec. 220. Fitz. Barr. 74. If the condition be, That the Feoffees or Lessees of the Obligor of such land which they have in trust shall grant me a Rent charge, or release their Right to me before such a day, and there be three Feoffees or Lessees, and two of them only do grant this Rent, or make this Release; this is no good performance of the condition.

To grant a Rent charge, or release.

Dyer 13. If the condition be, That the Obligor shall purchase and procure to me and my Heirs a Rent of 5 l. per annum, and a stranger hath such a Rent out of my land, and he doth get him to release this to me; this is a good performance of the condition. And if one be bound with condition to grant me the Rent and Farm of such a Mill before Michaelmas, to be had and received until I be paid 10 l. and before that time he lease the Mill to me as a Rent, and then suffer me to detain so much of the Rent; it seems this is a good performance of the condition.

Fitz. Barr. 77.

Co. Super. Lit. 207.

If the condition be to deliver me a horse, and the Obligor tender the horse unto me, and I refuse him; hereby the condition is performed; and so in all such like cases where the Obligor is to do any collateral thing, as stand to an Award, or the like; if the Obligor offer to do it, and the Obligee refuse, the condition is performed, and the Obligation discharged for ever.

To deliver a horse.

Tender and Refusal.

Dyer 17. Super. Lit. 202. Bro. Condition. 145.

If the condition be, To pay money at a day certain, and the Obligor pay a little before night, time enough for the Receiver to see to number his money by day-light; this is a good performance of the condition. And if the condition be to pay money by or before a day; payment the last instant of the day before is a sufficient performance of the condition.

To pay money

Perk. Sec. 748. 14. ff. 6. 17. 21 Ed. 3. 13. Co. 5. 117. 972. Bro. Oblig. 64.

If the condition be, To pay me a sum of money at a day certain, and the Obligor pay me less money before the day, or all the money before or at the day, or give me something else before, or at the day of payment in lieu thereof, or pay me all the money or a lesser sum at the day appointed, but in another place, and not the place mentioned in the condition, and I accept thereof; in all these cases the condition is well performed. But if a stranger to the condition do so, and I accept thereof, this is no good performance of the condition, as hath been adjudged. And if the Obligor pay less then the whole money at the day of payment, and the Obligee accept thereof: this is no good performance of the condition; And if the thing to be done be a collateral thing, as to account, or the like, and the Obligor give unto the Obligee money, or a horse in lieu thereof, and the Obligee accept it; this is no good performance

Acceptance;

** Trin. 94 Eliz.*

** Adjndg. 27 Eliz.*

Tender and
Refusal.

formance of the condition. And if the Obligor pay the money to the Obligee after the day of payment; this is no performance of the condition, but the Obligation is forfeit, and the money paid shall go in part towards the forfeiture: And yet in this case the Defendant at this day being sued upon this Obligation, doth usually adventure to plead conditions performed, and give the special matter in evidence to the Jury, who for the most part doth find against the Obligee. And yet if the condition be, To pay me money at a day certain, or to pay another money at a day certain, and the Obligor pay me or the stranger at several times before the day, and I or the stranger accept thereof; this is a good performance of the condition. But if the Obligee do only promise to accept of a horse for his money at the time of payment, and when the time of payment comes, and a tender of the horse is made to him, he doth refuse him; this tender is not a sufficient performance of the condition.

Dyer 98.

1 Ed. 6.

If the condition be, To pay money at a day and place certain, and the Obligor tender it at the time and place; and the Obligee is not ready to receive it, or being ready doth refuse to receive it; this is a good performance of the condition to save the forfeiture of the Obligation: And yet if the Obligor be afterwards sued for this money, he must say in his pleading, That he is still ready to pay it, and he must tender it in Court. But if one be bound by a single Obligation to pay money, and after at the same or some other time, he hath a Defeasance from the Obligee, That upon payment of a lesser sum the Obligation shall be void; and the Obligee refuse the money when the same is tendered at the time, when by the Defeasance it is to be paid, in this case the Obligor is not bound to tender the money in Court, neither hath the Obligee any remedy for it.

Co. Supp.
Lit. 304.
209. 37 H.
8. 10. Feb.
Sed. 706.

If the condition be, To pay me money at a day and place certain, and the Obligor doth tender it to me the same day in another place; this is no performance of the condition, and therefore in that case I may refuse it.

41 Ed. 3.

If the condition be, To pay money between two days, payment of the money upon either of those days is not a good performance of the condition, but the payment must be between the two days.

Dyer 17.

If the condition be, To pay me money at a day certain, and I bid the Obligor pay the money to one that I do owe so much more unto, or I bid him lay out the money for me, or I bid him keep it for such a Debt I owe unto him, and he do so, and I accept thereof; it seems this is a good performance of the condition.

Park. Sed.
743. 29 B.
C. 6. Fitz.
Caric. 47.

If the condition be to pay me money, and I appoint another to

to receive it, and the Obligor pay it unto him; this is a good performance of the condition.

Co. super. If the condition be, That a stranger shall pay to the Obligee 10 l. and the Obligee accept a horse for it, this is a good performance of Acceptance.
111. 108. the condition. But if the condition be that one stranger shall pay
109. Dyer to another stranger 10 l. and the one doth give, and the other take
56. a horse in lieu of this, this is no good performance of the condition.

New Terms of the Law. If the condition be, To pay me 20 l. of lawful English money
tit. Coin. and the Obligor pay me in Spanish or in any other money current, in this Realm, this is a good performance of the condition. But
Perk. Inf. payment in farthings is no good payment. If the condition be, To
Bridgman pay me 20 l. and the Obligor pay me some of the 20 l. in counterfeit
& Curia pieces, which I not perceiving at the time, do put up and accept, but after upon a review I do perceive some of them to be
in the Ma- naught, and thereupon I do send it back to him again; in this case
shes of Wales & it seems the condition is well performed, and therefore the
the Law sending back of the money again will not cause a breach afterwards.
Idom.

21 Ed. 4. 2. If the condition be, That I shall stand to the award of 1 s., and To stand to an
Award.
he doth award me to pay 20 l. to W s. by a day, and at the day I do tender him the 20 l. but he doth refuse it; in this case I have sufficiently performed the condition, and the Obligation is saved.

22 Ed. 4. If the condition be, That I shall stand to the award of 1 s., and he
56. award that I shall enter a Retraxit in a Suit depending between me and the other party, and I do not so, but am Nonsuit, or do discontinue my Suit; this is no good performance of the condition.

23 Ed. 4. If the condition be, That the Obligor shall come such a day to To shew a
44. such a place and shew me a Release, and he doth come to the place Release.
the latter part of the day, and doth stay there until the light of the day be gone, ready to shew his Release, but I come not thither; this is a good performance of the condition.

Dyer 255. If one make a Lease of Land to me, and binde himself in an For quiet en-
27 Ed. 4. 3. Obligation with condition to suffer me quietly to enjoy the land joying.
without the let of him or any other, in this case if he himself, nor any other by his incitement do disturb me, the condition is performed; and if a stranger that hath Title do enter without his procurement or occasion, this is no breach of the condition.

Perk. Inf. If the condition be, To appear in the Kings Bench such a day to To appear.
740. 758. answer 1 s., and at the day the Obligor doth appear, but the Plaintiff is essoined so that the Defendant cannot answer him, or the Suit is discontinued by the Demise of the King before the day of appearance; in these cases the condition is performed and the Obligation saved. But if the Obligor in this case when he doth

agreed, doth not cause his appearance to be entered of Record, the Obligation is forfeit.

If the condition be, To appear *coram Domino Rege*, and the Obligor appear before the Kings person; this is no performance of the condition. And if the condition be, to appear *coram Iudiciariis Domini Regis*, and the Obligor appear before them out of Court; this is no performance of the condition.

To make a Bond.

If the condition be, That a stranger shall make an obligation to the Obligee, and the stranger tender it, and the Obligee refuse it; this is a good performance of the condition: But if the condition be, That the Obligor shall make an obligation to a stranger, and the Obligor tender it, and the stranger refuse it: this is no performance of the condition.

Co. super
Lit. 208.
209. to H.
6. 16. 29.
H. 2. 1.

To marry a woman.

If the condition be, That the Obligor shall marry the daughter of the Obligee by a day, and he doth tender himself, and she doth refuse; in this case the obligation is forfeit, notwithstanding this tender and refusal.

Park. 60.
756. 40.
7. 3.

To leave a Possession.

If the condition be, To deliver the key of a house, and the quiet possession to *I S*, to the use of the Obligee, and the Obligor (the house being rid, and every one out of the house, and the door locked) doth deliver the key to *I S*; it seems this is no good performance of the condition, but that *I S*, or the Obligee or his deputy, ought to come and receive the possession. See more in Condition at *Numb. 9.* and *Covenant 6.*

Dyer 219.

9. When a single Obligation shall be said to be broken and forfeit, or not.

If an obligation that is single be not performed, as when it is to pay money at a day, and the money is not paid, the obligation is broken. But if a man be bound by an obligation to pay money at several days, the obligation is not forfeit, nor can be sued until all the days be past. And yet if the condition of an obligation be to pay money at several days, and the Obligor do fail to pay the money the first day, in this case the Obligee may sue for the money due by the obligation presently.

Co. 3. 159.
super Lit.
293. F. N.
B. 267.

If one be bound to pay money at a day certain by a single obligation or Bill, and the Obligor tender the money at the day to the Obligee, so as he will give him his Bill or a Release for the money, and the Obligee refuse to do, and thereupon he doth refuse to pay the money, in this case the obligation is not forfeit; for in this case the Obligor is not bound to pay the money, unless the Obligee will give up his Bill or give him a Release. But otherwise it is in case where one is bound to pay money by the condition of an obligation for there the Obligor must pay the money at his peril, albeit the Obligee refuse to deliver up the obligation or to give a Release.

Bro. Obl.
62. Falt.
205. Fin.
verdict.
13.

If one be bound to pay money on a single Bill at a day, and the Obligor tender the money at the day to the Obligee, and he refuse

it; in this case it seems he hath now remedy for his money; *Sed Quæritur.*

Bro. Obl.
37.

In all causes when the condition is not performed or broken, the obligation is forfeit, and till then it cannot be forfeit: And therefore, if one be bound in an obligation, with condition to pay me 10 l. at Easter before the day come, the obligation cannot be forfeit; but if it be not paid at the day, the obligation is forfeit:

10. When the condition of an obligation shall be said to be broken, and the obligation forfeit, or not.

To make a Feoffment.

4 H. 7. 4.

And yet if the Obligee himself be the cause of the breach of the condition, or the thing to be done by the condition, is now become impossible by the act of God, the obligation is now become without penalty: As if in the old days I had been bound in an obligation to an Abbot, that *A* should enfeoff him before Christmas, if *A* enter into Religion, my Bond had been presently forfeited: But otherwise it had been if *A* had been professed under the obedience of the Obligee himself.

Perk. Sect.
168. 769;

If the condition be to make a Feoffment of land to me such a day, and he be not upon the land ready to make the Feoffment, albeit I come not there to receive it, yet the condition is broken.

21 E. d. 3.
39
Cook. 5.
112.

If the condition be that when the Obligor shall come to his Aunt, he will enfeoff the Obligee, or the Heirs of his body, in this case he must do it as soon as he doth come to her, and the Obligee shall request the Feoffment, or the obligation is forfeit.

41 Ed. 4.
55.

If the condition be to enfeoff me of a Manor by a day, and before the day the Obligor doth make a Feoffment of it to another, hereby the condition is broken, and the obligation forfeit, and though the Obligor re-purchase it again before the day, and then make the Feoffment, yet this will not cure the breach.

4 H. 7. 4.

If the condition be, to enfeoff *B* and *C*; and one of them dye before the time be past wherein it should be done; in this case he must enfeoff the survivor of them, or the condition is broken.

Dyer 347.

If the condition be. That if the Obligor before Michaelmas make a Lease to the Obligee for thirty one years, if *A* will assent, and if he will not assent then for twenty one years, That then, &c. if *A* do not assent, and the Lease for twenty one years be not made before Michaelmas, the obligation is forfeit.

To make a Lease.

2 H. 6. 24.

If the condition be that the Obligor shall make me an estate upon request, and he tender me an estate before I request it, and afterwards I do request it, and he doth refuse it; in this case the condition is broken, and the obligation forfeit.

To make an Estate.

Pasche S.
Gu. B. Jac.

If the condition be that the Obligor shall make me a good estate of land (being Copihold Land) and he doth surrender it absolutely, and the Homage when they present it, do present it conditionally, this is no breach of the condition.

If the condition be, To make a good estate of land in Fee-simple to A (a woman) before such a time, and before such time the Obligor taketh A to wife, and the day pass, and no estate is made, in this case the condition is broken, and the obligation forfeit. But if the obligation be made to the woman her self, then it is dispensed with by the inter-marriage.

4 H. 7. 4.
Rel.

To make further assurance

If the condition be, That the Obligor and his son shall do all such acts for the better assuring of Land, as the Obligee or his Counsel shall devise, and the Obligee devise and tender a Release to the Obligor and his son to seal, and they delay and refuse to seal it until they can shew it to their Counsel to be advised upon it, this is a breach of the condition: but if they be illiterate, and refuse to seal it until they can get it read, this is no breach of the condition.

Co. 2. 3.
Dyer 317.

To save harmless.

If the condition be that the Obligor shall save the Obligee harmless from such a debt, for which the Obligee is Surety for the Obligor, and the Obligee cometh at the time, and to the place when and where the money, for which he is engaged, is to be paid, and finding no body ready to pay the money, he doth pay it himself to save the forfeiture of the obligation, hereby the condition to save harmless is broken, and the obligation forfeit. And therefore much more if the Obligee be sued, Arrested, outlawed, or taken in Execution for the Debt of the Principal: So also if the Obligee be put in fear of Arrest for the Debt of the Principal, and therefore dare not go about his business, by this the condition is broken. But if the Obligee be sued unjustly, either because he is sued before the money is due, or otherwise, or if the Bond in which he is bound, be against Law and void and he suffer himself to be unjustly vexed thereupon, and doth not take advantage of it, it seems this is no breach of the condition of the Bond to save harmless.

Dyer 186,
187, 188d.
4. 37, 18.
Co. 5. 14.
Old Book
of Entry.
12.

If a Bailiff distrain beasts on a withernam, and afterwards deliver them to the party of whom he had them, and take a Bond from him with condition to save him harmless from him for whom the beasts were taken, and after he doth bring a detinue against the Bailiff for the beasts, in this case the condition is not broken, for this action will not lie in this case.

2 H. 4. 2.

To pay money.

If the condition be to pay money to me at a day and place certain, and the money is not tendred at the time and place, albeit there be no body ready to receive it, if it be tendred, yet the condition is broken.

Kelw. 6a.

If the condition be to pay money to me at a day and place, and the Obligor in his going to the place is robbed of the money so as he cannot pay him; in this case notwithstanding the condition is broken, and the obligation forfeit, and this will not excuse it.

Bro. Owl.

If

Kelw. 60. If the condition be to pay money to me at a day and place, and I seeing him going to the place to pay the money, do with him to forbear, and thereupon he doth so, and doth not pay it; in this case the obligation is forfeit, and this will not excuse. But if I do violently and actually detain and hinder him, so that he cannot pay it, this will excuse him.

Hill 4 Jac. McInceux case. If the condition be to pay me the Rent reserved on such a Lease, To pay rent. at the times limited by the Lease, and it be not accordingly; hereby the condition is broken, albeit I do never demand the Rent.

B.co. Obl. If the condition be to pay me the Rent reserved on such a Lease, and I enter upon all or part of the Land demised, so as the Rent is suspended so long as I keep the possession, in this case the nonpayment of the Rent during the time of the suspension of the Rent, is no breach of the condition.

Dyer 204. If the condition be that I shall enjoy Land without the interruption of any person whatsoever, and afterwards I do forfeit it my self by non-payment of Rent, or the like; this is no breach of the condition. For quiet enjoying.

Dyer 255. 17 Ed. 4. 3. If the condition be, That the Obligor shall suffer the Obligee to enjoy Lands, &c. and that without the let of him, &c. or any other person or persons, &c. and one that hath an elder title doth enter; this is no breach of the condition. But if he procure this entry and disturbance, this is a breach of the condition.

Kelw. 60. If the condition be that *B* and others shall quietly enjoy land, and *A* the Obligor and *B* the Obligee doth disturb the others; it seems by this disturbance the condition is broken.

Co. 9. 51. If the condition be that the Obligor shall not disturb me in the keeping of my Courts, and he keep the Courts and take the Fees himself; this is a breach of the condition.

Co. Super lit. 384. If one make a Feoffment of land, and make me an obligation with condition to defend the land for 12 years, &c. and I am entred by a stranger, but never impleaded; in this case the condition is broken.

Co. 4. 61. 8. 83. If the condition be to stand to the Award of *I S*, and the Obligor, doth afterward Countermand the submission made to *I S*; this is a breach of the condition. *Factum non dicitur quod non perseverat.* To stand to an Award.

Co. 8. 82. 83. 18 Ed. 4. 20. If the condition be that I shall have licence to carry wood seven years, and the Obligor doth give me a licence for seven years, and then doth revoke it again; this is a breach of the condition. To give a licence.

18 Ed. 4. 23. If the condition be, That *I S* shall give me licence to go over his ground, and *I S* doth so, but another doth interrupt me; this is no breach of the condition. And yet if the condition be that I shall have licence to go over that ground, there perhaps such an interruption

ruption may be a breach of the condition.

To appear. If an obligation be made to me with condition to appear in such a Court, such a day, and at the day he is kept in prison at my Suit so as he cannot appear; in this case his not appearance is no breach of the condition, for his imprisonment shall excuse him. But if his imprisonment be for Felony, or any other such like cause of his own, *contra*. Fitz. Bar. 60.

If the condition be, to appear in such a Court such a day, and before the day a *Superfedeas* doth come to the Sheriff; yet if the Obligor do not appear, the obligation is forfeit. Dier 25.

To ride to Dover. If the condition be, That the Obligor shall ride with I S to Dover such a day, and I S doth not go thither that day, in this case it seems the condition is broken, and that he must procure I S to go thither and ride with him at his peril. Perk. Sect.

Not to alien. If I make a Lease for years, and the Lessee doth enter into an obligation with condition that he shall not alien the Land demised without my licence, and I dye, and then he doth alien it; it seems this is a breach of the condition. Per Just. Nicholas 13 Ja.

To serve. If the condition be that I S shall serve me in all my honest and lawfull commands, or that I S shall be a good and honest servant to me one year; in the first case if I command him nothing, the condition is not broken, albeit he never tender his Service: but in the last case it seems he is to tender his Service to me, or otherwise the condition will be broken. But if I refuse his service when it is tendered; or he dye within the time, the obligation is discharged. And yet if he depart away within the time, the condition is broken. Per Sect. 77 a. 6. Ed. 4. 2a.

To marry a woman. If the condition be that A shall marry B by a day, and before the day the obligor himself doth marry her: in this case the condition is broken. But if the Obligee marry her before the day, the obligation is discharged. 4 H. 7. 4. Perk. 799.

To perform Covenants. If the condition be, To perform the Covenants and payments of a Deed, and the Deed doth contain a Feoffment, and this is one condition, that if the Feoffor pay such a Sum of money he shall re-enter, and he doth not pay it; in this case this Non payment is no breach of the condition. But if A let land by indenture to B for years rendering Rent; and B doth bind himself in an obligation with condition to perform all the Covenants contained in the Indenture: and the Rent is unpaid; this is a breach of the condition, and cause of forfeiture of the obligation. B if fees case T. in. Jac. 8. R. Adjudged Griffin & Scots case 5 Jac. B. R.

To keep Prisoners. If the condition be for the safe keeping of Prisoners, and one doth escape that is in execution, and in prison under colour of an Execution, or the like, but in truth and in judgment of Law is no Prisoner; this escape is no breach of the condition. See more in *Condition at Numb. 10.* Curia Trin. 37 Eliz.

Co. Super
Lit. 307.

Co. 5. 22.
25 H. 7. 2.

Dyer 262.
15 H. 7. 4.
4 H. 7. 4.
Altree 9
Jac. in
Bathurst
case.

8 Ed. 4. 31.
Co. 5. 22.
Perk. Sect.
769. 757. 6.
H. 7. 4. 24.
Ed. 4. 37.

If the condition of an obligation consist of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are possible at the time of the making of the obligation, and before the time of performance one of the things is become impossible to be done by the act of God, or by the act of the Obligee himself; in this case the obligation is discharged for ever. And therefore if the condition be, That if the Obligor shall sell away his wives Land, if then he shall either in his life time purchase to his wife and her Heirs and Assigns land of as good right and value as the money by him received, or had by or upon the said sale shall amount unto, or else doe and shall leave unto her the said / as Executrix by Legacy or otherwise as much money as shall be by him received upon such sale, That then &c. and the Obligor doth sell his wives land, and then his wife doth dye before him so that he cannot leave her the money; in this case the obligation is discharged, and the husband is not bound to purchase land to her and her Heirs. So if the condition be, That if I S do not prove the suggestion of a Bill depending in the Court of Requests before the utas of Hillary, that then he shall pay 20 l. &c. and I S dye before the utas; hereby the obligation is discharged for ever, and he is not bound to pay the 20 l. So if the condition be that if the Obligor appear in the Kings Bench in Easter Term, or pay 20 l. To the Obligee at Michaelmas, and the Obligor dye before Easter Term; hereby the obligation is discharged; but if he do not appear in Easter Term and out live the Term, and dye after, then it seems the 20 l. must be paid at Michaelmas, or the obligation is forfeit. So if the condition be that the Obligor shall marry A before Easter, or pay 20 l. to the Obligee at Michaelmas, and A dye, or become mad before Easter, or the Obligee marry A himself, and the marriage doth continue between them untill Easter be past; in all these cases the obligation is discharged for ever. But when the thing is become impossible by the Act or Laches of the Obligor, the Law is otherwise. And therefore if the condition be, that A shall marry with B before Easter, or that the Obligor shall pay unto the Obligee 20 l. at Michaelmas, and the Obligor himself marry with B, and the marriage doth continue untill after Easter; hereby the obligation is not discharged. So if the condition be to deliver up an obligation before Easter, or give a Release at Michaelmas, and the Obligor doth lose the obligation, or the obligation is burnt; hereby the obligation is not discharged, for if he doth not make the Release at Michaelmas, he doth forfeit the obligation.

11. By what means and when an Obligation good in his original creation, doth or may become void, be discharged or gone by matter ex post facto. Or not.

If the condition of an obligation consist of one part onely, or be to do one thing at a time certain, and that thing at the time of the obligation made is possible to be done, but afterwards and before the time

time when it is to be performed it doth become impossible by the act of God, or the act of the Obligee; in this case also the obligation is gone and discharged for ever. And therefore if the condition be to appear in person such a day in such a Court, and before the day the Obligor die: or at the day the water doth arise so high that he cannot travel to the place without peril of life; in these cases the obligation is discharged. So if the Condition be, That *A* shall marry *B* before Easter, and before the time *A* or *B* die, or become mad, or the Obligee marry *B*, and the marriage doth continue untill after the day; in all these cases the obligation is discharged. But if the thing become impossible by the act of the Obligor, *contra*. And therefore if the Condition be, That the Obligor shall appear such a day, and before, and at the day he is imprisoned through some default of his own so that he cannot appear, this will not excuse him * no more then in case where he is so sick that he cannot appear without peril of his life. So if the Condition be that *B* shall marry *C* before Easter, and the Obligor himself marry her, and the marriage doth continue untill after the time, in this case the obligation is forfeit. * So if the Condition give the Obligor time all his life time to do the thing, the obligation is not discharged by his death, but in this case he must do it during his life time at his peril.

*So held in the Exchequer 3. Car.

*Curie Co. B. Hill. 37. Eliz.

If the Condition be, That the Obligor shall deliver to the Obligee an obligation or such a release as the Council of the Obligee shall devise before Michaelmas, and the Council of the Obligee devise no release before Michaelmas; hereby the obligation is gone for ever

Adjudge 17 Eliz. Co. B. Greeningham versus Ewe.

If the obligation depend upon, or be necessary to some other deed, and that deed become void; in this case the obligation is become void also; as if the Condition of the obligation be to perform the Covenants of an Indenture, and afterwards the Covenants be discharged or become void; by this means the obligation is discharged and gone for ever. And if one make a Lease for years rendering Rent, and the Lessee enter into an obligation with Condition to pay the Rent to the Lessor, and after it fall out so that the Lessee is evicted out of the Land by an elder Title, whereby the Rent in Law is gone; in this case and by this means the obligation is discharged and gone also. But if the eviction be but of a part of the land, *contra*.

Bro. Obl. 6. 88. 29. 4 H. 7. 6.

If an obligation be made to me, and delivered to *I* to my use, and when it is tendered to me, I do refuse it and disagree to it; hereby it is become void, and cannot afterwards be made good again. So if an obligation be made to my wife, and I disagree to it; hereby it is become void.

Co. 5. 119.

By a Release made from the Obligee to the Obligor or to one of

Fr. Bar. 37

of the Obligors if there be more then one, the obligation may be discharged. And therefore, if an obligation be made to me with condition to pay money, and I by my Deed release it, or acknowledge my self satisfied the Debt, albeit I receive none of it, or that I receive but part of it in full satisfaction of the Debt, by this the obligation is discharged for ever.

Bro. Obl.
61. Co. 8.
136. 8 Ed.
4. 3. 21 Ed.
4. 3. 11 H.
7. 4.

If the Obligee make the Obligor, or one of the Obligors, or all the Obligors, his Executor, or his Executors; hereby the obligation is discharged for ever. But the granting of Letters of Administration to one, or more of the Obligors, is no discharge of the obligation. And if the Obligor make the Obligee his Executor, this is no discharge of the obligation.

Bro. Obl.
61.

If the Obligee be a woman, and take the Obligor to husband, hereby the obligation is discharged.

Fitz. Bar.
133.

If the condition be to enfeoff K. S. (a woman) before such a time, and before the day the Obligor doth marry the woman, this doth not discharge the obligation.

Dyer. 325.

If the condition be to serve me seven years, and within the time I licence him to depart, it seems that hereby the obligation is discharged: And yet if the condition be to stand to an Award, and it is awarded that one of the parties shall pay 5. l. a year for seven years towards the education of I. S. and I. S. die within the seven years, the obligation is not discharged by his death, but the money must be paid during the time notwithstanding.

Dyer. 371.

If the condition be to do two things, or stand upon divers points; and the Obligee supposing the breach of one of them, doth sue the Obligor, and the issue being joyned upon that point, it is found against the Plaintiff, and he is barred; hereby the whole obligation is discharged, and so long as that Judgement is in force; he can never sue the obligation upon any other point within the condition.

Wyl. Bar.
64.

If the condition be to satisfy me for goods I have delivered to I. S. if they be lost, and afterwards they be lost, and I sue I. S. and have him in Execution for them; by this the obligation is not discharged; but perhaps when I have satisfaction of I. S. being in Execution for the goods, the obligation may be gone.

And in all other Cases by which a Debt in general may become void by matter *ex post facto*, as by Rasure or the like, an obligation may become void.

C H A P. XXII.

Of a Defeasance.

Defeasance,
Quid.

THIS in a large sense doth sometimes signifie a condition annexed to an estate, and sometimes the condition of an obligation made with, and annexed to the Obligation at the time of making thereof: But it is more peculiarly and properly applied to such conditional instruments as are made in defeasance and Avoidance of Statutes and Recognizances at the time of entring into the same Statutes or Recognizances, and to such conditional Instruments as are made in Defeasance of Statutes, Obligations and the like, after the time of the same Statutes entred into, and Obligations, &c. made: And it is therefore thus defined.

A Defeasance is a condition relating to a Deed, as to an Obligation, Recognizance, Statute or the like, which being performed by the Obligor or Recognisor, the Act is disabled and made void, as if it had never been done; which differeth from a condition onely in this, that this is always made at the same time, and annexed to, or inserted in the same Deed, but that is alwaies made in a Deed by it self, & for the most part made after the Deed whereunto it hath relation.

2. Where and in what cases a Defeasance may be; and what things may be defeated and avoided thereby; and where, and what not.

There is no Inheritance Executory, as Rents, Annuities, Conditions, Warranties, Covenants and such like, but may by a Defeasance made with the mutual consent of all those which were parties to the creation thereof at the same, or at any time after, be annulled, discharged and defeated. And so is the Law of Statutes, Recognizances, Obligations and the like; yet so, as in all these cases regularly, the Defeasance must be made *eadem modo* as the thing to be defeated was and is created, *viz.* if the one be by Deed, the other must be so also; for it is a rule, that in all cases when any Executory thing is created by a Deed, that the same thing by the consent of all persons which were parties to the creation of it, may be by their Deed defeated and annulled, and therefore that Warranties, Recognizances, Rents, Charges, Annuities, Covenants, Leases for years, Uses or Common-Law, and such like, may by a Defeasance made with the mutual consent of all those that were parties to the creation of it by Deed, be discharged and avoided.

Nihil est tam conveniens naturali aequitati quam quod unumquodque dissolvitur eo ligamini quo ligatur. And therefore by such a Defeasance, not onely the Covenant which doth create a power of Revocation, but the power it self created, may be utterly defeated and avoided: But estates of inheritance, and other estates in Tail or for life, executed by Livery, &c. cannot be avoided by Defeasance made after the time of their creation and first making. And yet by another

Co. super
Lit. 236,
237. 1. 111.
113. Plow.
137. 191.
21 H. 7. 13.
Bro. Defeasance
in proto. 4

other Deed of Defeasance made at the same time, a Feoffment, Release, Lease for life, or other exempting thing, may be avoided as well as if it were by condition, viz. in the same Deed; as if a Disfeisee release to the Disfeisor; this Release cannot be defeated by an Indenture of Defeasance made afterwards, but it may be defeated by an Indenture of Defeasance made at the same time. *Quæ in præstentis sunt in esse videtur.*

To make a good Defeasance, these things are requisite: 1. That the Defeasance be made *eodem modo*, as the thing to be defeated is created: for if the Obligee by word onely discharge the Obligor, or grant not to sue him; this will not defeat the obligation; it must be by Deed therefore as the former was. But whether the Deed of Defeasance be indented or poll is not material. 2. That if it do recite the Statute or the Obligation (as for the most part it doth) that it be done truly: for if a Defeasance be made of a Statute or an Obligation which is recited to be made the tenth day of May, whereas in truth it beareth date the first day of May, this Defeasance is void. 3. That it be made between the same persons that were parties to the first Deed, &c. And therefore if A be bound in an obligation to B in 20 l. and B make a Defeasance to C, That if C pay him 20 l. the obligation made by A shall be void; this is no good Defeasance, because it is not made between the same parties.

And yet if a Statute be made to the husband and wife, and the husband alone joyn in the making of a Defeasance, this is a good Defeasance. 4. That it be made after the making of the Recognizance, Obligation, &c. and not before; for if A grant to B, That if B will be bound to him in 20 l. by obligation, that the obligation shall be void, and after B doth binde himself to A in an obligation of 20 l. this Defeasance is not good, because it is before the obligation. And yet if the date of the Defeasance be before the date of the Recognizance, &c. and it be delivered after, it is good enough. 5. That it be made of a thing defeasible; for if a Disfeisee release his right to the Tenant, and after there is a Defeasance made between them, that if the Releasee shall pay 20 l. to the Releasee, the Release shall be void; this is a void Defeasance. And yet a Release may be avoided by a Condition or Defeasance made at the time of making of a Release as well as a Feoffment.

If a Defeasance of a Recognizance, Obligation, &c. be. That if the Cognizance Obligor do not pay a sum of money, or do not disturb the execution of the Will of JS, or do make Lease for years to JS, or the like; these are good Defeasances. As if the Grantee of a Rent-charge grant to his Grantor, That if he shall pay him 20 l. such a day, the Grant of the Rent shall be void. Albeit the condition of an obligation, that is repugnant to the obligation it self, is void, and the obligation single, yet it is otherwise in case of a defeasance made

5. What shall be said a good Defeasance, and what not, For the matter of it.

For the matter of it.

Ch. 1. 113.

Bro. Defeas. 12. Fitz. Barre. 95. Plow. 163.

14 H. 8. 10. Bro. Estra. 10. 10.

Bro. tit. Defeasance 3.

Bro. Defeasance 5.

Dyer 315.

Plow 137. Bro. Defeasance 11.

Bro. Defeasance 6. 3 Co. Inst. per Lit. 134.

See West. Synch. Bro. Defeasance in 100.

10 H. 7. 14. 11 H. 7. 32. Fitz. Barre 94.

And therefore if the Obligor after the Obligation made by Deed to the Obligor, that the Obligation shall be void, or that he will not sue the Obligation at all, or that he will not sue the Obligation until such a time, or that the Obligation shall be discharged, these Defeasances are good to avoid the Obligation.

It is said by 2
Boog a bid
pouchechell
Jon said w
-am the
Jillo 210

If the Feoffee with warranty grant, That neither he nor his Heirs shall take benefit of the warranty of the Feoffor or his Heirs, this is a good Defeasance of the warranty: And if he grant not to vouch, this will discharge the Voucher: And if he grant not to bring a warranty in Court, this will bar him of that remedy. In like manner it is, if the Grantee of a Rent charge grant to the Grantor, That he will not take any benefit by the grant, this is a total discharge, and if he grant he will not bring an Annuity, this is a discharge of the person, and if he grant that he will not distrain the land for the Rent, this is a discharge of the land.

Br. Defes.
4. 7. H. 4.
43. 21 H.
7. 23.
Perk. Sed.
49.

If one make a Lease for life by Deed, and after by another Deed doth grant to his Lessee, That he shall not be impeached for waste, this is a good discharge: And if the Lessee afterwards grant by Deed to the Lessor, That if he shall bring an Action of waste against the Lessee, that he will not make use, nor take advantage of the Deed of discharge, this is a good discharge of the Discharge. So that hereby it seems a Defeasance may be of a Defeasance, and one Defeasance after another, and regularly the last shall stand. And therefore if a Lease for years be made on condition to pay 20 l. at Easter, and the Lease to be void, and before Easter the Lessor, and Lessee agree, That if the Lessor pay it at Easter following, the Lease shall be void, and before that time they make the like agreement for another year, it seems these be good Defeasances, and that the last shall stand.

Br. Defes.
11 Condi-
tion, 110.

* Agree.
Palche 8.
2 Jac. Cav
8.

Perk. Inf.
Bridgman.

If the Defeasance after Execution made upon a Statute be thus, That if the Comor pay so much money, the Statute shall be void, it seems by this the Statute and Execution thereupon is void: howbeit, it is best to adde these words in the Defeasance [and the execution thereupon.]

Br. Defes.
7.

And now being coming towards an end, we come to the last Assurance of a mans life, or that kinde of Assurance that men do commonly make when they are near and towards the end of their life, and a Testament.

It is said by
the writing of the Will
of the testator: that he
of a Rent charge, grant to his Grantor, That he will
of the Grantor of the Rent shall be void, and the condition
of the obligation is, that it is to be paid to the obligation
and the obligation shall be void.

Chap.

Br. Defes.
4. 7. H. 4.
43. 21 H.
7. 23.
Perk. Sed.
49.

CHAP. XXIII.

Of a Testament.

Term of
the Law.
Lk. Bro.
Sec. 300.
Co. super
Lk. 111.
Swimb. of
Wills 24.

A Testament is the full and compleat declaration of a mans minde or last Will of that he would have to be done after his death: It is in Latin *Testamentum*, i. *Testaris mentis*, the witness of a mans minde; and to devise by Testament, is to speak by a mans Will what his minde is to have done after his death: And this is sometime called a Will, or last Will; for these words are Synonims, and are as it seems promiscuously used in our Law: Howsoever, by the Civil Law it is then onely said to be a Testament, when there is an Executor made and named in it; and when there is none, but a Codicil onely: for a Codicil is the same that a Testament is, but that it is without an Executor; and a man can make but one Testament that shall take effect, but he may make as many Codicils as he will. And by the Common Law where Lands or Tenements are devised in writing, albeit there be no Executor named, yet there it is properly called a last Will, and where it doth concern Chattels onely, a Testament. He that doth make the Testament is called the Testator: And when a man dyeth without Will, he is said to dye intestate.

1. Testament
Quid

Codicil, Quid

Testator: Intestate.

For. Sec.
276 Co.
Super Lit.
222.

Of Testaments there be two sorts, namely, a Testament in writing, or a written Testament which is, where the minde of the Testator in his life time, by himself or some other by his appointment, is put in writing. And a Testament by word or without writing, which is, where a man is sick, and for fear lest death, or want of memory or speech should surprise him, that he should be prevented if he stayed the writing of his Testament, desireth his Neighbors and Friends to bear witness of his last Will, and then declareth the same presently by word before them: And this is called a *Nuncupative*, or *Nuncupatory* Testament: And this being after his death proved by Witnesses, and put in writing by the Ordinary, is of as great force for any other thing but land, as when at the first in the life of the Testator it is put in writing. A Codicil also is in writing, or by word as a Testament is: The Civilians have other divisions of Wills and Testaments, as solemn and unsolemn, privileged and unprivileged, whereof the Common Law maketh no mention.

Quintuplex

Nuncupative.

Term of
the Law.
de. De.
viti. Co.
Super Lit.
222.

The parts of every compleat Testament whereof it doth consist, are two, 1. The making of Devises, or giving of Legacies: 2. The making and ordination of an Executor. For a Testament can be no more without then a Codicil can be without an Executor.

2. The Parts of it.

ADe

A Testament.

Devise or Legacy.

A Devise or Legacy is where a man in his Testament doth give any thing to another. The gift of the former is properly applied to the gift of land, and the last to the gift of goods or chattels: and therefore a Devise strictly is said to be where a man in his Testament doth give his land to another after his decease; and a Legacy is said to be where a man in his Testament doth give any chattel to another to have after the death of the Testator, but the word is promiscuously applied to the one and to the other. And he that gives by such a Will is called the Devisor, and he to whom the thing is given, the Devisee or Legatee.

Devise, Devisee, or Legatee.
Examples.

And a Devise is sometimes simple and without condition, as where I give my land to another and his Heirs, or I give 20 l. to another, without more words. And sometimes it is with a condition which is when there is a quality added to the Devise or Legacy, whereby the effect of it is suspended or hindered, and it is thereby made to depend on some future event. And this condition in this case may be made almost by any words. As if I give to one my land if he pay 10 l. to my daughter, or so as he pay 20 l. to my daughter, or paying 20 l. to my daughter, or I give one 20 l. if he marry my daughter, or when he shall marry my daughter, or I give my wife 20 l. a year while she shall live unmarried, or I give to him, or to whomsoever shall marry my daughter 20 l. or the like; in all these cases the Devise is conditional. The first kinde of Devise is called by the Civilians a simple assignation, and the latter a conditional assignation.

Executor.
Reid.

An Executor in a large sense is taken for any one that is appointed to have the disposition and ordering of the goods and chattels of a man that is dead. And so there are three kinds of executors: the first is a *lege constitutus*, who is therefore called *legitimus*, and such a one is the Ordinary of the Diocese who hath ordinary jurisdiction in matters ecclesiastical: the second is a *Testator constitutus*, who is therefore called *Testamentarius*, and he is strictly and properly called an executor, and is defined to be one appointed by a mans last Will and Testament to have the disposing and administration of all or part of a mans goods and chattels, and to perform a mans last Will and Testament, according to the contents thereof, the third is an *Episcopo constitutus*, who is therefore said to be *Datus*. And such a one is an Administrator, who is defined to be one that hath the goods and chattels of a man dying intestate committed to his charge by the Ordinary for want of an executor. And his power, benefit and charge is in all things equal to the power, benefit and charge of an executor.

Administrator.

Examples.

The executor and Administrator also is sometimes universal or total, i. one that hath the power and disposition of the whole personal estate committed to him. And sometimes he is particular

Dyer 117.
74. Co.
Lupton's Lit.
217. 3. 11.
112.
134. 135.

New
Terms of
the law.
Co. 2. 117.
Plover, 200
Co. 2. 117.
Lit. 209.
Co. 2. 117.

Dyer 41.
Bro. 2. 117.
Co. 2. 117.

One that hath the power and disposition of some part of the Estate, or of all the Estate for a time only committed to him. And sometimes he is absolute, i. such a one that hath an absolute power of the Estate, as Executor or Administrator, and sometimes he is conditional: i. one that hath a limited and conditional power of the Estate only. And in both cases he shall be charged and chargeable for so much as is committed to him as the Testator or Intestate himself: for this cause the Executor is said to represent the person of the Testator; for as to the Estate committed to his trust he may charge others, and be charged himself, sue and be sued, as the Testator himself might. And the Estate he hath by his Executorship is said to be in him to the use of the Testator and in his Right: and that he doth in the disposition of his Estate is said to be in the right and to the use of the Testator also; And the Administrator hath the same power and property over and in the Goods and Chattels, the same remedy by Suit, and so far forth shall be charged as the Executor, for they differ not in nature, but in name only. And yet the Administrator is but the Ordinaries Deputy, and he may revoke the Administration, or call the Administrator to an account.

Represent the person of the Testator.

A Testament is of that nature that it doth much differ from other Acts and Deeds that men do and execute in their life times: for albeit it be made, sealed and published in never so solemn a manner, yet it hath no life nor vertue in it until the Testators death; for it is a Maxime in Law, *Omne Testamentum morte consummationis est, Et voluntas ambulatoria usque ad extremum vita exitum*; it is therefore resembled until death to the Interlocutory Sentence, and after death to the Definitive Sentence of a Judge. And hence it is said, *Sequitur servanda fides; Suprema voluntas. Quod mandati firmitas habet patere necesse est*. And for this cause a man may alter, or make void his Will at his pleasure, and he may make as many new Wills and Testaments as he will, and there is no means under the Sun to bar a man of this liberty. And the latter Testament doth always revoke and overthrow the former; but otherwise it is of a Codicil, for a man may make as many of these as he will, and make no Testament at all, or if he make a Testament he may afterwards make as many Codicils as he will, and one of them will not overthrow the other. For in the first case they must be all annexed to the Letters of Administration, and the Administrator must perform them, and in the latter case they must be all annexed to the Testament, and the Executor must take care to perform them. A Testament therefore is said to have three degrees. 1. An Intention, which is the making of it. 2. A Progression, which is the publication of it. 3. A Consummation, which is the death of the Testator. In Grants therefore, the first is of greatest force, but

3. The nature and effect of a Testament, and of a Codicil.

3. The nature and effect of a Testament, and of a Codicil.

in Testaments the last is of greatest force. But when a Testament is perfect by the death of the party, it doth as effectually give and transfer Estates, and alter the property of Lands and Goods, as acts executed by deeds in the life time of the parties, for hereby descents of Lands are prevented, and a man may make Estates in Fee-simple, Fee-tail, for life or years, of Lands, Tenements, Rents, Reversions or Services, as effectually as by Deed, and these Estates also will be good without any Livery of Seisin or Attornment. And hereby also Rents, and power to distrain for them may be referred: Conditions created and annexed to Estates, or things devised. And therefore they that take by devise of Lands, are said to take in the nature of Purchasers. And if therefore a Tenant in Tail make a Feoffment to the use of himself in Fee, and after devise the same Land to his Wife in Fee, and die, the Son is not remitted, though the Father die seised: for the Devise doth prevent the Descent.

To the making of every good Testament, these things are requisite:

4. What shall be said a good and a sufficient Testament, or not. First, in respect of the person that doth make it, and the thing whereof it is made. And what persons may make a Testament, And of what things, or not, And how. A Fewer copy.

1. That the Testator be a person able to make a Testament, and not disabled for any special cause, either in respect of his person, minde, or condition, or in respect of the thing whereof the Testament is to be made. And for this it must be known: That a woman that hath a Husband cannot make a Testament of her Lands or Goods, except it be in some special cases; for of her Lands she can make no Testament with, or without her Husbands consent: Of the Goods and Chattels she hath as Executrix, to any other she may make an Executor without her Husbands consent; for if she do not so, the Administration of them must be granted to the next of Kin to the deceased Testator, and shall not go to the Husband: But of them she can make no devise with or without her Husbands leave, for they are not devisable; and if she do devise them, the Devise is void. And of the things due to the Wife whereof she was not possessed during the marriage, as things in action, and the like, it seems she may make her Testament, at least she may make her Husband Executor of her Paraphernalia, viz. her necessary wearing Apparel, being that which is fit for one of her rank: some say she may make a Testament without her Husbands leave, others doubt of this, howbeit all agree that she and not his Executor shall have this after her Husbands death, and that the Husband cannot give it away from her. And of the Goods and Chattels her Husband hath, either by her or otherwise, she may not make a Testament without the licence and consent of her Husband first had so to do. But with his leave and consent she may make a Testament of his goods, and make him her Executor if she will. And it is said also, that if she do make a Testament of his Goods (in truth, without his leave and consent) and he after her death

Lib. 3^o.
167, 168.

Perk. Secb.
503.

Dier. 224.

Co. 632.

Stat. 32 8.
34 H. 8. 9.
Co. 4 51.
8. a. Testa-
ment 13.

15 H. 2. 4.
Perk. Secb.
502. Fitz.
Execut. 40.

Plow. 526.
Fitz. Exe-
cutor 104.

12 H. 9. 4.
88 Ed. 4. 11.
Perk. Secb.
501. Fitz.
Execut. 4.
12 H. 9. 4.
Fitz. Testa-
ment 13.

411. 1011.

12 H. 9. 4.

12 H. 9. 4.

12 H. 9. 4.

under the Will to be proved, and deliver the Goods accordingly; in this case the Testament is good. And yet if the Husband give his Wife leave to make a Testament of his Goods, and she do so, he may revoke the same at any time in her life time, or after her death before the Will be proved. But a woman after Contract with any man, may before the marriage make a Testament as well as any other, and is not at all disabled hereby.

Sta. 32 Ed.
2. c. 5.
Perk. Sec. 2.
503. 504.
Br Custom
50. Swin.
37. 38.

An Infant until he be of the age of One and twenty years can make no Testament of his Lands by Statutes of 32 and 34 H. 8. But by special custom in some places where Land is devisable by custom, he may devise it sooner. And of his Goods and Chattels, if he be a Boy, he may make a Testament at Fourteen years of age, and not before, and if a Maid, at Twelve years of age, and not before; and then they may do it without and against the consent of their Tutor, Father, or Guardian. And yet some say an Infant cannot make a Testament of his Goods and Chattels until he be Eighteen years of age. A Mad or Lunatick person during the time of his Infancy of minde cannot make a Testament of Lands or Goods; but such a one as hath his *lucida intervalla*, clear or calm intermissions, may during the time of such quietness and freedom of minde make his Testament, and it will be good. So also an Idiot, *i. e.* such a one as cannot number Twenty, or tell what age he is, or the like, cannot make a Testament, or dispose of his Lands or Goods; and albeit he do make a wise, reasonable, and sensible Testament, yet is the Testament void. But such a one as is of a mean understanding onely, that hath *græssum caput*, and is of the middle sort between a wise man and a fool, is not prohibited to make a Testament. So also an old man, that by reason of his great age is childish again, or so forgetful, that he doth forget his own name, cannot make a Testament; for a Testament made by such a one is void. So also it seems a drunken man, that is so excessively drunk, that he is deprived of the use of Reason and Understanding during that time, may not make a Testament; for it is requisite when the Testator doth make his Will, that he be of sound and perfect memory, *i. e.* that he have a reasonable memory and understanding to dispose of his estate with reason. A man that is both deaf and dumb, and that is so by nature, cannot make a Testament. But a man that is so by accident, may by writing or signs make a Testament. And so may a man that is deaf or dumb by nature or accident. And so also may a man that is blinde. An Alien born cannot make a Testament of Lands or Goods. A man that is entered into Religion, cannot make a Testament. A Traitor attainted from the time of the Treason committed can make no Testament of his Lands or Goods; for they are all forfeit to the King; but after the time he hath a pardon from the King for his offence,

Co. Super
lit. 89.

Perk. Sec. 2.
503. 504.
24. Swin.
37. 40.

Swinb. 19.
40.

Swinb. 41.

Co. 623.
Hil. 1. Car.
per the L.
Keeper in
Chancery.
Swin. 53.

Co. 623.
R. 7 Jac.
2. c. 5 & 6.
24. c. 11.
Swinb. 34.

An Infant.

A Lunatick person.

An Idiot.

An old man.

A deaf and dumb man.

An Alien.

A Traitor.

A Felon.

fence, he may make a Testament of his Lands or Goods as another man. A man that is arraigned or convicted of felony cannot make a Testament of his Lands or Goods, for they are forfeit; but if a man be only indicted, and die before Arraignment, his Testament is good for his Lands and Goods both. And if he be indicted and will not answer upon his Arraignment, but standeth mute, &c. in this case his Lands are not forfeit, and therefore it seemeth he may make a Testament of them. And if a man kill himself, his Testament, as to his Goods and Chattels is void, but as to his Lands is good.

A Felo de fe.

An outlawed person.

A Corporation.

A Villain.

A man that is outlawed in a personal Action cannot make a Testament of his Goods and Chattels so long as the Outlawry doth continue in force; but of his Lands he may make a Testament. The head, or any of the members of a Corporation may not make a Testament of the Lands or Goods they have in Common, for they shall go in succession. A Villain cannot make a Testament of his Lands or Goods after the Lord hath seized them. But here note, that howsoever the Testaments of Traytors, Aliens, Felons, Outlawed persons and Villains be void as to the King, or Lord that hath right to the Lands or Goods by forfeiture or otherwise, yet it seems the Testament is good against the Testator himself, and all others but such persons onely. And here note further also, by the Civil Law also the Testament of divers others, as Excommunicate persons, Hereticks, Usurers, Incestuous persons, Sodomites, Libellers, and the like, are void. But by our Law, the Testaments of such persons, at least as to their Lands, are good by the Statutes that do enable men to devise their Lands. But all other persons whatsoever, male or female, old or young, lay or spiritual, rich or poor, at any time before their death, whiles they are able to speak so distinctly, or write so plainly as another may understand them, and understand that they understand themselves, may make Testaments of their Lands, Goods, and Chattels, and that albeit they have sworn to the contrary; and none are restrained of this liberty, but such as are before named. See more *infra* to this matter.

Secondly, in respect of the minde of him that doth make it.

The second thing required to the making of a good Testament, is that he that doth make it, have at the time of the making of it *animus testandi*, i. e. a minde to dispose, a firm resolution, and advised determination to make a Testament; otherwise the Testament will be void; for it is the minde not the words of the Testator that doth give live life to the Testament, for if a man rashly, unduly, incidently, jestingly, or boastingly, and not seriously write or say that such a one shall be his Executor, or have all his goods, or that he will give to such a one such a thing, this is no Testament, nor to be regarded. And the minde of the Testator, herein is to be discovered by circumstances; for if at the time he be sick, or set himself seriously to make his Testament, or require witnesses to bear

Prerogative.
Reg. Plow.
253, 254.

Plow. Ma.

First Dec.

25.

Fitz. test.

Swinh. 155.

&c. See the

Stat. 31. &

34 H. 8.

Perk. Sec.

496.

See more

infra at

Num. 7.

Swinh. 2.

131, 245.

125.

bear

bear witness of it, it shall be deemed in earnest, but if it be by way of discourse onely, or of somewhat he will do hereafter, or the like, it shall be taken for nothing.

swin. 283,
284, 285,
286.

The third thing required in a good Testament is, that the minde of the Testator in the making of it be free, and not moved by fear, fraud, or flattery, for when a Testator is moved to make his Testament by fear, or circumvented by fraud, or overcome by some immoderate flattery; the same is void, or at least voidable by exception. And therefore if a man by occasion of some present fear, or violence, or threatening of future evils, do at the same time, or afterwards by the same motive make a Testament: this Testament is void, not onely as to him that put him so in fear, but as to all others, albeit the Testator confirm it with an arch. But if the cause of fear be some vain matter, or being weighty is removed, and the Testator doth afterwards when the fear is past, confirm the Testament; in this case perhaps the Testament may be good. And if a man by occasion of some fraud or deceit be moved to make a Testament, if the deceit be such as may move a prudent man or woman, and if it be evil also, the Testament is void or voidable at the least; but if the deceit be light and small, or if it be to a good end, as where a man is about to give all his Estate to some lewd person from his Wife and Children, and they perswade the Testator that the lewd fellow is dead, or the like and thereby procure him to give his Estate to them; this is a good Testament. And one may by honest intercessions, and modest perswasions procure another to make himself or a stranger Executor to him, or the like, and this will not hurt the Testament. Also a man may use fair and flattering speeches to move the Testator to make his Testament, and to give his Estate unto himself, or some friend of his, except it be in case where the flatterer doth first beat or threaten him, or put him in fear, or to his flattery joyneth fraud and deceit, or the Testator is a person of weak judgement, or under the danger of government of the flatterer, as when the Physician shall perswade his Patient under his hands to make his Testament, and give his Estate to himself; or the Wife attending on her Husband in his sickness shall neglect him, or continually provoke him to give her all, or where the perswader is importunate and will have no denial, or when there is another Testament made before; for in all these cases the Testament will be in danger to be avoided. And if I be much privy to another mans mind, and he tell me often in his health how he doth intend to settle his Estate, and he being sick, I do of mine own head draw a Will according to his mind before declared to me, and bring it to him, and ask him whether this shall be his Will or no, and he doth consider of it, and then deliver it back to me, and say, yea; this is a good Testament: But if otherwise, some friends of a sick man of their own heads, shall make a

Thirdly, in respect of the occasion or motive of it.

Will, and bring it to a man in extremity of sickness, and read it so him, and ask him whether this shall be his Will, and he say yea, yea: Or if a man be in great extremity, and his friends press him much, and so wrest words from him, especially if it be in advantage of them, or some friends of theirs; in these cases the Testaments are very suspicious.

But as touching these two last things, *Quarry* how they shall avail in the Wills of Land which are not regulated so much by the Civil Law.

Fourthly, in respect of the manner and form of the disposition.

1. Naming of an Executor.

The fourth thing required in the making of a good Testament, is, That the form and order that the Law prescribeth, be observed in the disposition. And therefore 1. that there be an Executor named in all Testaments of Goods and Chattels; and that that Executor named be capable of the Executorship; for this is said to be the head and foundation of the Testament: for if there be never so many Legacies given, and no Executor made, this disposition is but a Codicil, and cannot properly be called a Testament: for in this case the party dead is said to die intestate, and the Administration of his goods must be granted to the Widow, or next of kin; whereas on the other side, if an Executor be appointed, albeit there be no Legacy given, yet this disposition is, and is properly said to be a Testament. 2. If the Testament be of Lands or Tenements, it must be in writing, and it must be committed to writing at the time of the making thereof: And it is not sufficient that it be put in writing after the death of the Testator, being first made by word of mouth only, for then it is but *Nuncupative* still. But if the Testament be first made by word of mouth, and be afterwards written, and then brought to the Testator, and he approve it for his Testament: Or if the Testator, when he doth declare his mind, doth appoint that the same shall be written, and thereupon the same is written accordingly in the life time of the Testator; these are good Testaments of land, and as good as if they be written at the first. If therefore one be very sick, and another come to him, and ask him whether his wife shall have his Land, and he say yea, and a Clerk being present doth put this in writing without any precedent commandment or subsequent allowance of the sick man; this is no good Testament of the Land. So if one declare his whole minde before witnesses, and send for a Notary to write it, and dye before he come, and he write it after his death; this is no good Testament for his Lands, but a good *Nuncupative* Will for his Goods and Chattels, except he declare his mind to be, that it shall not be his Will unless it be put in writing, for then perhaps it may not be a good Will for his Goods and Chattels. So if he that doth write the Will cannot hear the party speak, and another that stands by the sick man doth tell him what he doth say; in this case if there be none others present

Swin. 128.
Bro. Test.
201.

Stat. 32. &
3 H. 8.
Perk. Sec.
476, 477.
Dier. 72.
Plow. 245.
Co. 4. 60.
Dier 537.

2. If it be of lands, it must be in writing.

Adjudged.
Trim. 10.
12.

to prove that he reported the very words of the sick man, this will be no good Testament of the Land. But if a Notary take direction from the sick man for his Will, and after go away and write it, and then doth bring it again and read it to the Testator, and he approve it: Or if it be written from his mouth by the Notary according to his minde, and his minde were to have it written, albeit it be not shewed or read to him afterwards, these are good Testaments. So if the Notary do onely take certain rude notes or directions from the sick man which he doth agree unto, and they be afterwards writtē fair in his life time, and not shewed to him again, or not written fair until after his death, these are good Testaments of Lands. If a sick man bid the Notary make a Testament of his Lands, but doth not tell him how, and the Notary make a Devise of it after his own mind, this is no good Testament: and yet if it be after read unto, and approved by the Testator, it may be good. And so if a Testament be found written in the Testators house, and not known by whom, and it be read unto and approved by the Testator, this is not a good Testament in writing for Lands

and goods. 3. Uses of lands before the Statute of Uses, might, and Lands and tenements devisable by Custom, and Goods and Chattels may be disposed by word without writing, and such Testaments of such things so made are good. 4. It is not material in what matter or stuff, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand, or letters, whether in Secretary hand, Roman hand or Court hand, or in any other hand a Testament be written, so it be fair and legible that it may be read and understood: Neither is it material whether the same be written at large, or by notes, or characters usual or unusual, as xx^s for twenty shillings, or when the figure (2) is used instead of the letter A, if it be usual in the Testators writing, or the like, for the Testament is good notwithstanding. So also if some words be omitted, or sentences improper used, when the intent and meaning is apparent, as where a man saith, [I make my wife of this my last Will and Testament] leaving out the word [Executrix] yet the Testament is good, and this shall be understood: But if it be so done as it cannot be read, or by reading the minde of the Testator cannot be known, then is the Testament void and of no force. In the like manner as a *Nuncupative* Will is, when the words spoken are so ambiguous, obscure and uncertain, that thereby the meaning of the Testator cannot be known nor understood. Where writing is needful (as in the case of disposition of land it is) there sealing of the Testament, or subscribing of the Testators name is not necessary. And therefore if a man by himself or another, do make a Testament of his Land, and do not put his Seal or Name to it, if he agree to it, this is a sufficient Testament.

3. Uses and lands by custom, and chattels devisable without writing.

4. The matter or hand wherein and whereby it is written.

5. Sealing and subscribing the Testators name not needful.

Sixthly, interruption in the making of the will.

6. If whiles the Testator is making his Will, and whiles he intendeth to proceed further at that time either by adding, diminishing, or altering, he be suddenly stricken with sickness or insanity of minde whereby he cannot proceed, but gives it over in the midst and so he die; it seems in this case the whole Will is void. And yet if a man begin his Will, and make perfect Devises to one, and then of himself he give over until another time: or if a man make a perfect Devise to one, and then die before he can make any Devise to any others; it seems these are good Testaments for as much as is done. And therefore it is said if one command another to make his Will, and by it to devise white acre to I. S. and his Heirs, and black acre to I. N. and his Heirs, and he write the Devise to I. S. and his Heirs, and the Testator die before he can write the Devise to I. N. and his Heirs, this is a good Devise to I. S. but a void Devise to I. N. and his Heirs. But if a man bid the Notary write a Devise of his land to I. S. upon condition and the Notary write a Devise to I. S. but the Testator dieth before he can write the condition, in this case the whole Devise is void. But a man may if he please make a Testament of part of his goods, and die Intestate for the rest, & that disposition he doth make is good for so much.

Swinb. 6.
Lit. Bro.
sect. 300.
Swinb. par.
7. sect. 10.
Co. 3 31.

Seventhly, in respect of the proof of it, and what shall be said a sufficient proof of a Testament, or not.

7. The last thing required to the perfection of a Testament, is, that it be proved; for if it be never so well made, and be in truth the Testament of the Testator, yet if it cannot be by proof made to appear so, it is but a void Testament, and of no force at all. And therefore herein these things are to be known: 1. That a *Noncupative* Testament must be proved by two Witnesses at the least, and those must be such as are without exception. 2. A written Testament when it is written with the Testators own hand, doth prove and approve it self, and therefore need not the help of Witnesses to prove it. And for this cause if a mans Testament be found written fair and perfect with his own hand after his death, albeit it be not subscribed with his name, sealed with his Seal, or have any Witnesses to it, if it be known or can be proved to be his hand, it is held to be a good Testament and a sufficient proof of it self; but if it be sealed with his seal, and subscribed with the name of the Testator, and can be proved by Witnesses, it is the more authentick. And when it is found amongst the choise Evidences of the Testator, or fast locked up in a safe place, it is the more esteemed; for if it be written in another hand, and the Testators hand and seal, or one of them not to it, albeit it be found in such a place as before, yet some proof will be expected of it further by witnesses in that case. And if a writing be found under the Testators own hand, yet if it be but a scribbling written Copy-wise, with a great distance between every line without any date, in strange characters, with many interlinings, and lying amongst his void papers or the like; this will not be esteemed

Swin. 128.

Swin. part.
7. sect. 13.
par. 4 sect.
15.

esteemed a sufficient Testament nor a good proof of it; but it shall be accounted rather a draught or image of the Testator's Will for a direction to him after to make his Will by: And yet if it can be proved that the Testator did declare himself that this should be his Will; this will be a good Testament, and a good proof of it. 3. If it be proved the Testator said his Testament was in such a Schedule in the hands of I. S. and I. S. produce a writing deposing it to be the same, it seems this is a sufficient proof; but if he say withal it is written with his own hand, then it seems some other proof, as by comparing hands, or the like, that it is his hand, wherein it is written, will be expected. 4. If the Witnesses will prove the writing produced to be the last Will of the Testator, or that he said, It was; or it should be his last Will, or that it is the same writing that was shewed unto them, and whereunto they are witnesses, albeit they never heard it read, or set their hands to it, it is a sufficient proof.

5. All persons male and female, rich and poor, are esteemed competent witnesses to prove a Will, save onely such as are infamous, as perjured persons, and the like; and such as want understanding and judgement, as Children, Infants, and the like; and such as are presumed to bear affection, as Kindred, Tenants, Servants, and the like. A Legatee is reputed a competent witness to prove any other part of the Will but his own Legacy, or to prove any thing against himself touching his own Legacy, but not otherwise. And therefore where there be two witnesses of a Will, wherein either of them have somewhat bequeathed unto himself, this Will cannot be sufficiently proved for those Legacies; but for the rest of the Will it may be sufficiently proved. 6. Where there is no question nor opposition moved or had about, or against a Testament, there the Oath of the Executor alone is esteemed a sufficient proof of it; and in that case regularly no other proof is required. And where more proof is necessary, as in the cases before, it is in the discretion of the Ordinary, what proof to admit and allow: And these witnesses for number, nature and quality; or that other proof that he doth deem and accept for sufficient is sufficient; and the Testament so proved by such witnesses, or other proof is sufficiently proved. And of this Question see more *infra*, at Numb. 7.

A Testament sufficient and good in his creation and beginning, may afterwards become void by divers means, as first by Countermaund or Revocation, and this is sometimes by the parties himself that made it, and sometimes it is by another: And sometimes it is expressed; and sometimes it is implied; for it is a rule, That any act or thing done, or words spoken by the Testator after the Testament made, or that doth alter or cross all or part of his Testament made before, is a Revocation of it, or of that part thereof that is so crossed and altered. And therefore if a feme covert make a Tes-

Witness competent to prove a Testament.

5. Where, and how a Testament good in his beginning may become void by matter, *ex post facto*, or not. By Countermaund or Revocation.

Co. 4. 61.
Lit. Sect.
168.
Plow. 344.
341. Swin.
part 7.
ded. 14, 15.
Perk. Sect.
498. Co. 3.
36. 8. 82.
83.

stament, and after take a Husband; by this the Testament is revoked. And if a man make a Testament of land, and after make a Feoffment of the same land, which Feoffment is not good for some defect in the Livery of Seisin, or otherwise, so that the Feoffor dieth seised of the land notwithstanding; hereby the Testament as to this land is revoked. So if a man make a latter Testament, and therein by exprels words doth revoke the former Testament, or if a man by any writing, or by word of mouth (For one may by word of mouth revoke a Will in writing, albeit it be of land) do expr. sly revoke a former Testament that he hath made and make no new Testament (for so a man may do, and die intestate if he will) or if a man make a latter Testament, and make no mention of the former Testament; all these are Countermands of the former Testament. And the latter Testament doth always revoke the former, and that albeit the Executor of the latter do refuse the Executorship, or dye during the life of the Testator, or after his death; and albeit the King be made Executor of the former, and albeit the former be a written, and the latter but a *Nuncupative* Testament; and this holdeth true in a Testament of Lands, as well as in a Testament of Goods and Chattels; but otherwise it is *à converso*: for however a man may by word avoid a Will made in writing that is good, yet a man cannot by word make good; and affirm a Will made in writing that is void: And therefore if a man devise his land in writing to I. S. and his Heirs, and I. S. die before the Devisor, and after the Devisor say by word, that the Heirs of I. S. shall have the land, as I. S. should have had it if he had lived, this verbal declaration will not affirm the disposition. Also the latter Testament doth infringe the former, albeit there be no mention made in the latter of revoking the former; and albeit there be twenty Witnesses of the former, and but two or none of the latter; and albeit in the former the Executor be appointed simply and without condition, and in the latter he be appointed conditionally, and the same condition be also broken, so that the condition be of something then to come, at the time when the condition was made; but if the Executor of the latter Testament be made upon some condition then present or past, the condition not existing, the former Testament is not revoked; and albeit the former Testament be made irrevokable, *i. e.* that the Testator say, I make this my last Will and Testament irrevokable; and albeit the Testator hath sworn not to revoke the former, the Oath being also revoked together with the Testament: and albeit the Testator enter into an Obligation with condition not to revoke it, but then in this case he doth forfeit his Obligation. But the latter Testament doth not revoke the former in these cases following: *i. e.* When the latter is imperfect in respect of Will: *i. e.* When the Testator dieth whiles he is making of it,

Dier 310.
34 Elliz. R.
R. Burton
case.

Condition.

it, and before he can finish it, or when it is vehemently suspected that the Testator was compelled to make the latter by fear or violence, or induced to make it by fraud and deceit: or when the former was made by the Testator while he was in his good and perfect minde and memory, and the latter is made by him when he is *inops mentis*; or when the latter is made by the perswasion, and for the benefit of certain persons, when the Testator is in extremity of sickness, unless it appear plainly to be the expresse Will of the Testator to revoke the former, or unless the Testator himself did dictate the latter; or in case the latter be in favor of the Children of the Testator or others, who are to have the Administration of his goods if he die intestate. 2. When the Testator doth make two Testaments, a former and a latter, both being written, and afterwards lying sick upon his death bed, they are both presented unto him, and he is desired to deliver to one of the standers by, which of them he will have to stand for his last Will, and he deliver the former. 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings. 4. When in the latter Testament there is no Executor named, for then it is but a Codicil or addition to the former. 5. When the latter is made upon some sudden discontent against the Executor of the former Testament, and afterwards he and the Executor are reconciled again; in these and such like cases, the latter Testament is no revocation of the former. If the Husband licence the wife to make a Testament, and after her death he forbid the Probate; this is a Countermand of the Testament. But note here, that Revocations in general are not favored in Law; and therefore he that will avoid a former Will by Revocation, must see he prove it well. 2. A good Testament may become void by cancelling or other destruction of it, as where the Testator himself, or someo her by his commandment doth cut or tear it in pieces, deface it, or cast it into the fire; by this means the Testament is made void, except it be in case where the Testator doth it unadvisedly, or it be done by some other without his consent; or by some casualty, or when he doth willingly pull away the Seals and then he doth afterwards seal it again, or where the whole Testament is not cancelled or defaced, but some or the chief part thereof, as the naming the Executor, or the like, for it is good still for the residue; or where there be several papers or writings, of one, ten, or each of them, containing the whole Testament, the cancelling or defacing some of them doth not hurt the Testament, unless it can be proved that the Testators minde were so avoid it all, or where the Testament is lost in the life time of the Testator, or after; for in this case so much as can be proved by witnesses is still in force. 3. A good Testament may become void by alteration of the estate of the Testator, as when a man after the time of making

Lib. Bro.
55.

Equin. lib. 7.
part Sec.
16.

Swinh. lib.
7. Oct. 1967

2 By cancelling of it.

3. By alteration of the estate of the Testator.

making the Testament, and before his death is convicted or condemned of some great crime, for the which the Law depriveth him of the making of a Testament, as Treason, Felony, or the like. And yet if the crime be pardoned and purged before his death, the Testament may be good enough. And if a man of sane and perfect memory make his Testament, and after become *inops mentis* as every

Co. 4. 6a

Fourthly, by
intention to
alter it.

man for the most part is before his death; this doth not hurt the Testament. 4. A good Testament may become void by an intention onely to alter it when the Testator is hindred in his intention that it cannot take effect: And therefore if when the Testator intendeth to alter his Testament, or to make a new one, he be by fear or fraud forbidden or letten, that he dare not or cannot alter it, or the Notary or the Witnesses dare not, or may not be suffered to come to him, as when a Wife or some other that is to have benefit by the former Will, under pretence that she hath a charge from the Physician that none shall come at him, or under pretence that he is allseep, or the like, will not suffer any body to come at him; or when the Notary and Witnesses are all present, and they make such a noise or quarrelling that they hinder the effect of his intent; or when the Testator is kept from doing it by importunate requests and flattering perswasions; in all these cases, and by these means the former Testament may become void. But if it appear the Testator hath no purpose to alter the Testament when he is let as aforesaid; the fear is a vain fear. the Testator is prohibited at another time, and not the time when he doth intend to alter the Testament, but he hath sundry opportunities after that time to do it, and doth it not, or he is drawn onely by the fair speeches of a Wife or Friend, or by the weeping or other trouble arising from the grief of the Legatary or Executor for the Testators sickness onely he is disturbed; in these cases perhaps it may not be void. And where it is void by the prohibition of a Legatary onely, it is void for so much as doth concern him onely, and not for the rest of the Testament. 5. A good Testament may become void by making another of the same date; for if two Testaments be found after the death of the Testator, and it cannot be discerned or proved which was made former or latter; the one of them doth overthrow the other, and both of them are become void, except they be both to the same purpose, or one of them be made in favor to Wife and children, &c. and the other to strangers. And yet in the first case also the Testator by declaration of his mind, which of them he will have to take effect; may make either of them good. 6. A good

Sw'n. part.
4. sed. 11.

Fifthly, by making another
of the same
date.

Testament may be made void by the declaration of the Testators minde, as if a man have two Testaments lying by him, the one made after the other, and they are both shewed or delivered to the Testator, when he lieth sick, and he by word or sign declare that

Sw'n. part.
7. sed. 11.
Perk. sed.
479.

Sixthly, by the
declaration of
the Testator.

that he will have the former to stand; this declaration doth revoke the latter, and affirm the former. And where a man would revoke a Will for any of these causes, he must presently after the death of the Testator put in a *Caveat* or Exception in that Court where the Will is to be proved, and thereupon proceed to question it; or by a prohibition in some cases he may stay the probate in the Spiritual Court. See more *infra* at Num. 12.

Perk. Sec. 501. Co. 2. p. 255.

If a woman covert, without the leave of her Husband make a Testament of her Husbands goods, and the Husband doth after her death connive at the Probate, and deliver the goods accordingly, hereby the Testament of the Wife is become good; but if an Infant or mad man make a Testament in the time of his Infancy, or madness, and after the Infant or mad man become of full age, or sober, before his death, it seems these Testaments are void. And yet if the Infant at his full age, or the mad man when he is sober make a publication of this Testament, it may perhaps be good.

6. Where a Testament void or voidable in his inception, may become good by some matter or accident *ex post facto*. And where not.

Perk. Sec. 479. Co. 4. 61. Flow. 214.

If a man make a former and a latter Will, and by this latter the former is revoked, and after the Testator declare himself that the former shall stand, by this the former that was void before, is now become good again. And yet if a man make a Will that is void, and it be proved after his death, this Probate will not make it good, but it doth remain void, as it was before.

If a Feme sole make a Will, and then take a Husband whereby the Will is countermanded, and so become void; if her Husband die, so that she become sole again: This accident will not make the Will good again, but it doth remain void still: but perhaps by a new publication after she doth become sole, it may become good again. See more *infra* at Num. 11.

See before at Num. 4.

To the making of a good and sufficient Devise, these things are requisite. 1. That there be a Devisor, and that he be a person able to devise, and that both in respect of the condition of his own person, and of the thing whereof the Devise is made. 2. That there be a Devisee, and that he be a person capable and able to receive the thing devised, either at the time when the Devise is made, or at least when the Devise is to take effect. 3. That the Devisor have at the time of the Devise made *testandi*, i. a minde to make a Devise. 4. That the Will of the Devisor be free, and not drawn or coerced by fraud, flattery, fear, or the like. 5. That the Devise be made in due manner and form. 6. That the thing devised be a thing devisable. 7. That it be devised upon lawful terms and conditions. 8. That there be words sufficient to make his minde known. 9. That it be proved after the death of the Devisor. 10. And if it be a Devise of land, it is further required that the Devisor be solely seised of the land, and not jointly.

Perk. Sec. 406. See before at Num. 4. & after at Num. 12.

7. What shall be said a good and sufficient Devise or Legacy, or not.

First, in respect of matter touching the Devisor, and who may be the Devisor.

ly seised with another, and that he be seised of an estate in Fee-simple: and that the Devise be in writing. And for the first of these it is to be known, that whosoever may make a Testament, may make a Devise of the same thing of which he may make a Testament. *Et sic converso.* And whosoever is disabled to make a Testament, is disabled to devise by such a Testament. And therefore Infants may not devise their Lands until they be one and twenty years of age, nor their Goods and Chattels until they be fourteen years of age (or as some say, until they be eighteen years of age.) Women that have Husbands, cannot devise their Lands to their own Husbands or others, either by or without their Husbands consent, albeit there be a custom to enable them thereunto; but all such Devises are void. And Spiritual persons, as Archbishops, Bishops, Deans, Archdeacons, Prebends, Parsons, Vicars, or any member of a Corporation may not devise the Lands or Goods they have in the right see. And who of their Churches and Corporations. And for the second thing, may be a Devisee. And by what name, 1. That regularly, whosoever may be a Grantee, may be a Devisee or Legatee. And therefore a Devise made to any person or persons, male or female, children or strangers, Bondmen or Freemen, Laymen or Clerks, Debtors or Creditors, Infants or men of full age, Women sole or covert, Colledges, Universities, Corporations, or the like, are good. But it is said, that if any Legacy be given to an Heresick, Apostate, Traitor, Felon, Excommunicate person, Outlawed person, Bastard, unlawful Colledge, Libeller, Sodomite, Usurer, Recusant convict, it is void by the Civil Law, except it be in some special cases. And yet it seems a Devise of Lands to any such person is good within the Statute of Wills. ^a A Devise to an Infant in the womb of its Mother, at the time of the death of the Testator is void. ^b And yet if a man devise to such an Infant, and he happen to be born before the death of the Testator, it seems in this case the Devise is good; for it is a rule, ^c That the Devisee must be capable of the thing devised at the time of the death of the Devisor; if it be then to take effect in possession, or if it be a remainder, he must be capable of it at the time when the remainder shall happen, or otherwise the Devise is void. And a man may devise his Lands, Goods or Chattels, to his own Wife, as well as to any other. 2. But he that may be thus a Devisee, and is capable of a thing devised, must be certainly named and described; for if a Devise be to a person altogether incertain, the Devise is altogether void. And therefore if I give my Land to my best friend, or to my best friends, these are void Devises. So if I give my land to a Vicar, and say not to what Vicar, this Devise is void, and no Averment will help in this case. If one have two Sons of one name called I. S. and he devise to his Son I. S. without any distinction; it seems this Devise is void for uncertainty; but

Secondly, in respect of the matter touching the Devisee. And who of their Churches and Corporations. And for the second thing, may be a Devisee. And by what name,

Incertainly.

Averment.

Co. App.
Lit. 112.
6. Bro.
Devise 13.

Perk. 368.
496.

Perk. 368.
505. 510.
Swin. 221.
see infra at
num. 13.

4 Dier 305.
304. 311.
Curia, Mic.
13 Jac.
5 Newcomb
of Law, in
Devise, see
infra num.
11.
9 J. B. R.

Lit. 368.
168.
Lit. Bro.
sect. 55.

M. 19 Jac.
curia, 311.
Crump
v. Bodle.

Co. 6. 68.
Swin. 293.
294. 295.
296.

in

in this case perhaps an Averment which son is meant, may help. So if one give to *I S* 20 *l.* and there be two or more of that name, this Devise is void, except it may be proved by some thing which of them he meant. So if one say in his Testament, I give to one of the world 10 *l.* this Devise is void for incertainty. So if one give him 20 *l.* whose name is written in a Schedule in the custody of such a man, and in truth there is no such Schedule in the custody of such a man to be found; or if there be no name written therein, it seems these Legacies are void for incertainty. So if a man give a Legacy to a man incertain, and no such man is to be found, and the meaning of the Testator cannot be known, this Devise is void. And yet if a man by his Will say thus, I Devise to him that shall marry my Daughter, this is a good Devise, and he that doth marry my Daughter in my lifetime, or after my death, shall have it. And if a man devise anything *ad piam causam*, as to the Church, or to the Poor, not expressing what Church or Poor, this perhaps may be a good Devise. So if a man give 20 *l.* to his Kindred, it is said this is a good Devise, and that a reasonable exposition shall be made of it, as near the intent of the Testator as may be, viz. that those in the next degree shall have it first, and then those in the next degree to that shall have it afterwards, and if it be a Devise to the kindred of another man, that they shall have it equally. (See *quere* of this Devise, for it seems altogether uncertain.) So if a man give to *I S*, or *I D* 20 *l.* this is held to be a good Devise, albeit it be somewhat incertain, and the Disjunctive shall be taken for a Copulative, and so *I S* and *I D* shall take both by this Devise, but if in this case one of them be nearer of kin then the other, then it is said he shall have it for his life, and the other afterwards. And if one devise 20 *l.* to *A* or *B*, which of them *I S* will appoint, this is a good Devise, and he that *I S* shall appoint shall have it. And if one devise to *I S* and his children, this is a good Devise and certain enough, and hereby he and his children shall take the thing devised together. 3. And as the person to whom the Devise is made, must be capable, and certainly described and named, so must he be capable by that name by which the Devise is made to him, for otherwise the Devise is void. And therefore if a Devise be to the Heirs of *I S*, *I S* being living, this Devise is void. And yet if Lands or Goods be devised to the Executor of *I S*, and he dye before the Testator and make Executors, this is a good Devise to the Executors. And if a man devise his land to *I S* for life, the remainder to the next of kin, [or next of blood] of *I S*, this is a good Devise of a remainder. And if a man devise Goods to the Parish of *S*, of the Parish of *S* to the use of the Church, this is a good Devise, and the Churchwardens may recover it. And if a man devise *Parish* *Sancti* *Andree* *bolis*

Sol. part
2. Sect. 9.

Nov. 945
Ch. 1. 105.
151.
Pub. Sec.
154.

Fin. De.
151.
152.
153.
154.
155.
156.
157.
158.
159.
160.

done

Misnaming.

With a devise to a man devise to the City of London, University of Oxford, or Queen's College in Oxford, these are good Devise. But if one devise to the Commonalty of a Guild, church, and incorporate, as to two of the middle men of this Guild of the Friars by the Whittakes in London, or the like, this Devise is void. That is the person he capable, well named, and capable by that name; if his name be truly set down, yet if his name be not so, but mistaken, the Devise is void. And therefore if one is making a devise to A or B, devise to I N 20 L this Devise is void: both to I A and I N, except the person be certainly denoted and described by some other circumstance, as for I N the Son of I S my Landlord, or the like. So if one devise to the Abbot of St. Paul, when the Foundation is the Abbot of St. Paul, this Devise is void. And if one devise to a Corporation, and there be none of that name at the time of the Devise, nor during the life of the Testator, this Devise is void; and so also it seems the Law is, if there be a Collage made after of that name. But if one devise a thing to the Wife of I S, and before the Deviseor die, I S die, and she take another Husband, and is called by another name; yet this Devise is good. So if one give a Legacy to I S, Dean of Paul, and the Chapter there, and their Successors, and after, before the death of the Deviseor, I S dye, and another is made Dean, yet this Devise is good notwithstanding she is mistaken. For the third and fourth thing required in a good Devise; See before at Numb.

Fifthly, In respect of matter touching the manner and form of the Devise. And how a Devise may be made.

Part 2, 3. And for the fifth thing, it is to be known, First, That Land and Tenements devisable by Custom, may be devised by a Nominative Will without any writing for any time whatsoever, as Lises at the Common Law that are now within the Statute might have been. Also those Lises that remain at the Common Law, and are not within the Statute, may be devised by word without any writing. But no Estate can be made of Lands by Devise upon the Statute, except the Devise be in writing; and so man may devise his land, albeit he make no Executor, for an Executor hath nothing to do with the Freehold of Land. Also Goods and Chattels, Leases for years of Lands, Wards, Villains and the like, may be devised by words without any writing at all. And yet it seems questionable whether a Lease for years of a House, Common or such like thing, be devisable by word without writing. Second, The form of words in a Devise is not at all regarded; and therefore if one say, I give, institute, bequeath, appoint, or will, that I S shall have my Land, or that I S shall have so and so, let I S have my Land or so, all these Devises are as good as if he say, I devise to I S my Land or so. And therefore if one at this day make the Statute of 27 Hen. 8. that his Brother or the Lady shall be seized

Dier 4.
Perk 16.
505.
Swin. 215.
290.

Plow. 344.

Co. super
Lit. 111.
Plow. 245.
Swin. 215.
L. 100.
121.
122. 201.
123.

Plow. 345.
Swin. part.
1. 101. 12.
Dier 140.

121.
Swin. 215.
122.
123.
124.
125.
126.
127.
128.
129.
130.

seised of the Land to the use of *I S* and his Heirs, or to the use of *I S* and the Heirs of his body, or if such a man devise that his Feoffees shall make an Estate of the Land to *I S* and his Heirs, or to him and the Heirs of his body, this is a good Devise of the Land in Fee simple, or Fee-tail. And if a man make a Feoffment of his Land to the use of his last Will, and then devise that his Feoffees shall be seised to the use of *I S*; this is a good Devise of the Land *per intentionem*. And if I devise that *I S* shall have, hold, and occupy my Land for his life; this is a good Devise of the Land for his life. If a man have a Lease for years of Land, and he devise his Lease, or his Term, or his Ferm, or the profits or occupation of the Land; by either of these Devises his whole Lease and all his interest in the Land is given, as well as by any other form of words. 3. A man may devise Lands, Tenements, or Hereditaments in possession in Fee, for life or years; or he may devise it in reversion, *viz.* to one for life, the remainder to another in Fee, or in tail, or in any other sort, as a man may grant it by his Deed, and such Devises are good. But if the Fee-simple of Land be devised to one, the remainder cannot be devised to another, albeit the first Devise be but conditional. And therefore if Land be devised to *I S* and his Heirs, and if he dye without Heirs, that it shall remain to *I N* and his Heirs; this is a void remainder to *I N*. So if a man devise his land to *I S* in Fee, *ita quod solvas I N* twenty pounds, and if he fail that it shall remain to *I N* and his Heirs, this remainder to *I N* is void; for if *I* fail of payment, *I N* shall not enter and have the Land, but the Heir of the Devisor. And yet perhaps

Palshe 9
Jac. New
mans tale.

Plow 546
Co. 4. 66.
8. 95.

Dier 123.
33. 828.
Co. 1. 83.
6. 42.
Dier 4. 133.

Dier 139.
146.

Plow. 522.
Perk. sect.
16. See
Condition
Co. 8. 95.

a Rent may be devised after this manner. Howbeit if another man have a rent charge of 20*l.* a year issuing out of my land for twenty years; and he devise this unto me until I have levied a hundred pound by way of retainer, the remainder to *I S*; this remainder is not good. 4. A Devise may be of Lands, Goods, or Chattels simply and absolutely, or conditionally; the simple Devise also may be in Condition. *presenti*, or in *future*. And therefore as a Devise to one and his Heirs in *presenti*, is good, so a Devise to one and his Heirs after the death of *I S* is good. If I devise Land to *I S* and his Heirs on condition, as so as, or *ita quod*, he pay ten pound to *W S*, or paying to *W S* ten pound, or *ad solvendum* ten pound to *I S*; the Devise in all these cases is a good conditional Devise; and if the condition be not performed or broken, the estate is ended and the Heir may take advantage of it. And therefore if Lands be so given to the Heir, the condition is idle, because none can enter but him. And if I devise that if *I S* pay my Executors twenty pound, that he shall have white acre to him and his Heirs for ever, or for life, &c. this is a good Devise, and after the contingent shall take effect accordingly, and in this case and such like the Heir of the Devisor must keep the land un-

Limitation.

til the contingent do happen. In like manner as if it be a Chattel, the Executor shall keep the thing until the Condition be performed, and after a condition broken he shall take advantage of it. 5. A Devise may be also with a limitation, as in the cases before, and as where one gives Land to another and his Heirs, so long as I. S. shall have Heirs of his body; or where one doth devise his Land to A his Son and his Heirs for ever, paying to B his Brother twenty pounds when he shall come of age; and then that he shall enter and have it to him and his Heirs, and if he die without Heirs of his body, the said B then living, then that B and his Heirs shall have it in the same manner: And these and such like Devises are good. 6. A man that is seised of Land in Fee, may devise that his Executors shall sell it, or may devise it to his Executors to sell, or devise it to his Executors, and that they shall sell it; and these Devises are good. 7. A Devise may be of a Rent, or of Land reserving a Rent, with clause of Distress. As if a man devise Land to I. S. paying ten pounds by the year to his wife; and if it be unpaid, that she shall distrain for it; this is a good Devise. But a Warranty cannot be made by Will. And yet if a man devise Land to another for life, or in tail, reserving a Rent, in this case the Heirs of the Devisor shall be bound to the Warranty in Law, and the Devisee shall take advantage of it. 8. A man may devise his Land to one, and devise a Rent out of the same Land to another, and these Devises are good. So a man may devise his Land to one in Fee, and after devise the same land to another for life or years; and these are good Devises, and may stand together. So also if a man in the fore part of his Will by general words devise all his Lands to one in Fee, and in the latter part of his Will, devise some special part of it to another in Fee; these Devises are good and shall stand together; as for example, if one have a Farm, and in the first part of his Will give this Farm to one, and in the latter part of his Will give one Close (a part of this Farm to another) or a man devise all his land in B (which is in the County of *Glouc.*) to A his Daughter, and the latter part of his Will deviseth all his Land in the County of *Gloucester*, in the possession of I. S. to his Son, and part of the Land in B is in the possession of I. S. and in *Glocestershire*; these are good Devises and shall stand together. But otherwise it is when the general clause doth come last, as where one doth give his Land to A his Daughter, and in the latter part of his Will doth give all his land in *Hartfordshire*, and in the possession of I. S. to W, and the land given to A is in *Hartfordshire*, and in the possession of I. S.; in this case the Devises will not stand together, for the first Devise is void; and so also it is where both the Devises are particular, as, where first in a man's Will, he doth give white acre to A and his Heirs, and after in his Will he doth give white acre to B and his Heirs,

Co. Super.
Lit. 112.
223. 296.Dier 348.
100. 8. 26.
85.Co. Super.
Lit. 386.Plow. 533.
540.
Dier 357.
Co. 9. 94.
83.38 Eliz.
Co. B. Ar.
greed di.
ye. 5 times

Clause of Distress.

Warranty.

Dier in his
Lecture 1.
& per inst.
Doder.

Tru. 9 Ja.
B.R.

Flow. 523.
546.

Co. 895.
Flow. 519.
546. 516.
549.
Dier 277.

Co. 10. 87.
49. post he
17 Ja. B. R.
child veri.
Baily.

37 H. 6 30.
Lit. Bro.
sect. 388.
334 309.

Finch 321.
4. sect. 17.

Flow. 524.

Heirs: In this case the first Devise to *A* is void. And yet in this last case, some have held the Devises shall be good, and that *A* and *B* shall be Joynt-tenants *Idco quare*. If one devise all his Land to *I. S.* and his Heirs, excepting twenty pound for seven years, which he willeth shall be employed for his children; this is a good Devise of this sum of twenty pounds a year. 9 And a man may devise his Land for so many years as *I. S.* shall name, and after appoint that his Son shall have it during the minority of his Son, and both these Devises may stand together: and therefore if *A* be possessed of the Manor of *D* for years, and he deviseth all his term to his eldest son if he live so long, and if he die before he have any issue of his body, then to his younger son in the same manner, but withal he doth appoint that his wife shall have the occupation of the land until his eldest son be one and twenty years of age; these Devises shall stand together, and the wife shall enjoy the Mannor for that time, by this Devise. 10. A man may devise a term of years by way of remainder; as for example, a man that is possessed of a term of years of land, may devise it to *I. S.* for life, the remainder to *I. D.* or to *I. S.* for life, and that it shall after remain to *I. D.* or to *I. S.* for so many years as he shall live, and after to *I. D.* or in any such like manner, these are good Devises both to the first, and to him in remainder also by way of Executory devise, though not by way of remainder, and in this case the first Devisee cannot hinder the second Devisee of the remnant of the term. But a man cannot by Deed in his life time grant his term in this manner: Nor if a man be possessed of a term can he entail it by his Will; and therefore if a man possessed of his term of years of Land devise his term or his Land to *I. S.* and his Heirs, or to *I. S.* and the Heirs of his body, or to *I. S.* and his Issues, the remainder to *I. D.* this remainder is void, and it is a good Devise of the whole term to *I. S.* and his Executors. Also a Chattel personal may (as it seems) be devised to one for life, and afterwards to another, but yet so as the one must have the property onely, and the first but the occupation only, as if one devise that *I. D.* shall have the occupation of his Plate for his life, and after that it shall remain to *I. S.*; this is a good Devise of the Plate to *I. S.* But if the thing it self be devised to the first of them, then the Devise to the second is void, for the gift of a Chattel Personal for one hour, is the gift of it forever. And so it did seem in the Lady *Davis* case. *Hill. 9.*

Car. B. R. 11. A Legacy of Goods or Chattels may be given to, or until a certain time, or from, or after a time certain or incertain; as for five years, or from, or until the marriage of *A* or the like, and these Dispositions are good. 12. A man may devise his Land for so many years as *I. S.* shall name, and if *I. S.* do name a certain number of years in the life time of the De-

Grant.

Sixthly, in respect of matter touching the thing devised, and what may be devised, and by what name. Devise of Lands and Tenements.

visor, this will be a good Devise. But if one devise his land for so many years as his Executor shall name, it seems this Devise is not good. 6. As touching the sixth thing required in a good Devise, these things are to be known. 1 That Lands, Tenements, and Hereditaments for the nature and quality of them are devisible as well as other things. And therefore by the custom of some places, Lands in possession, reversion or remainder, are devisible in Fee for life, or years; and a man that hath a Lease for years of land may devise the land at his pleasure during his term. But by the antient Common Law in favor to Heirs, the Lands that a man had in Fee simple were not devisible by Testament, except onely in some special places, by the custom of the place, as Gavelkind Lands in Kent, and Lands within certain Burrough Towns, as London, Oxford, &c. And by the custom of those places such Lands are devisible: And in some places the custom is, that they may devise their purchased Lands onely; and in other places, that they may devise their Lands descended also: And in some places the custom is that they may devise for life onely; And in other places, that they may devise in Fee simple and Fee tail also. And in all these places where such customs are, they may devise their lands now as they might have done before the Statute; for the Statute hath not destroyed their custom. And therefore at this day they that have such lands in such places, have their election either to devise according to the power the custom doth give them, or according to the power the Statute doth give them, and in the first case the Devise is good against the Heir for the whole; and in the last case, it is good against him for two parts in three onely. Also by the Common Law, the Uses of lands were devisible, as goods and Chattels were at the pleasure of him that had them. But otherwise, and in other cases, Lands, and Tenements might not be devised and disposed by Will, untill 32 H. 8. at which time the owners of Lands, Tenements, Rents, &c. were by Act of Parliament enabled to devise and dispose their Lands as followeth: He that hath any land in possession, reversion, or remainder by Socage Tenure, and hath no land held in Capite or by Knights Service, may devise all his Land, or any Rent, Common or other profit, appender out of it to any person in Fee simple, Fee tail, for life or years, at his pleasure. He that hath any such Land held of the King in Capite by Knights Service, or by Knights Service and not in Chief, or held of any common person by Knights Service, may devise two parts thereof in three, to be divided, or any Rent, &c. out of those two parts at his pleasure, and no more, for the third part must descend to the heir and come to satisfy the Lord his duties; and therefore the Devise of the whole Land in this case is void for the third part. He that hath any such Land held by Knights Service in Capite, and other Lands held by Socage

Dier 191.
Co. 8. 83.
6. 26.
Super Lit.
114.
Perk. Sect.
499. 500.
497. 538.
Lt. Sect.
167. Dier.
155. Old
N. B.

Perk. Sect.
497. 538.
538.

Stat. 34.
8 c. 1.
34 H. 8. c. 5.

Socage Tenure may devise two parts of the whole, and no more, or any Rent, &c. out of it at his pleasure. He that doth hold Land of the King by Knights Service only, and not in Capite; or if a mean Lord by Knights Service, and hath also other Lands held by Socage Tenure may devise two parts in three of all the Land held by Knights Service or any Rent, &c. out of it, and all his Socage Land at his pleasure. So that now by these Statutes, a man that hath Lands in Fee-simple, may devise them in Fee-simple, Fee tail for life, or years absolutely, or conditional at his pleasure. And therefore if one devise his Land to one for life, the remainder in Fee, or Fee-tail to another, or devise his Land to B, the remainder to the next Heir male of B, and the Heirs males of the body of such Heir male or the like, these are good Devises. But for the more full understanding of these things, it is to be known in the next place, 2. That this Statute doth not enable men to devise Land that are disabled by Law in respect of their persons or mindes, as Infants, women Covert, men *de non sane memorie*, or the like; nor such as are disabled in respect either of the nature of their Land, as Copy-holders (for Copy-hold-land is not devisable) or of the Estate they have in Land, as Tenants in Tail, or *pur autre vie*, or Joynt-tenants; for these can no more devise their Land they do so hold, then they could before the Statute. But such as are seised of Land in Common, or Coparcenery, may devise their land as well as those that are sole seised. And if two be Joynt-tenants for life, the Fee-simple to one of them, he that hath the Fee-simple, may devise his Fee-simple after the death of his companion. Neither doth this Statute enable those that are seised of Lands in Fee, in the right of their Houses and Churches, to devise the same Lands; and therefore, Bishops, Deans, Parsons, Vicars, Masters of Hospitals, or the like, can no more devise the Lands belonging to their Bishopricks, &c. then they could before the Statute, but the Lands they are seised of in their own right, they may devise like other men. 3. Hereditaments that are not of any yearly value, are some of them devisable, and some not: for if the King grant to one and his Heirs *bona & catalla solum & fugitivum vel malagatorum*, Fines, and Amercements within such a Manor or Village; in this case, the owner can neither devise these things to another, as part of the two parts, nor leave them to descend for a third part. And yet if one have a Mannor unto which a Lect, Waif, Estray, or the like, is Appendant or Appurtenant; there by the Devise of the Mannor with the Appurtenances, these things may pass as incident to the Manor: But if a man have a Hundred, with the Goods of Felons, Out-laws, Fines, Amercements, *Ritorna brevium*, and other such casual Hereditaments within the same Hundred, and these have been usually let to Farm for a Rent; in this case, these things may be devised

See the Statute
Co. super
Lit. 111.
Perk. Secd.
344.
Lit. secd.
287.
Dier 210.
old N.B.
89
Perk. Secd.
500, 539.
340, 496,
497, 498.

Co. ro. 81.
3. 32.
super Lit.
111.

vised or left to descend for a third part. 4. Such incertain Franchises, as before, that are Hereditaments of no yearly value, albeit they are not devisable, yet may restrain the Devise of a mans Lands and Tenements, and make it void for a third part, if they be held *in capite*, for if it is not requisite, that the thing held by the Tenant *in capite* be devisable: and such things as may not be left to descend to the Lord for a third part, and to satisfie him, his duties may notwithstanding be devisable, or restrain the Devise of other Lands and Tenements, and make it void for a third part. And therefore a Reversion upon an estate Tail, which is dry and fruitless, if it be holden of the King by Knights service *in capite*, will hinder the Devise of the third part of a mans Lands and Tenements: Also an estate tail of Lands held *in capite* may restrain the Devise of a third part of other Lands. And therefore, if such Lands be conveyed to one and the Heirs of his body, the remainder to another, and he have other Lands in Socage; if he have any issue, he can devise but two parts of his Socage Land. And where the Statute speaks of a remainder, it is to be intended of such a remainder onely, as may draw Ward and Marriage by the Common-Law, and this is that remainder onely, that doth hinder a Devise. And therefore if *A* be seised of Lands in Socage Tenure, and *B* be seised of Lands in Fee, held *in capite* by Knights service, and *B* make a Lease for life, or gift in tail to *C*, the remainder to *A* in Tail or in Fee; in this case *A* during the estate for life or in tail, may devise all his Socage Land, notwithstanding this remainder. But if a man make a Lease for life or years, and after grant the Reversion for life or in Tail, the remainder in Fee, and after the Granter for life dieth, or Donee in Tail dieth without issue; in this case, this Remainder which now is in point of Reversion, will restrain the Devise of other Lands, and make it void for a third part. 5. In all cases where a man is restrained to devise any part of his Lands held in Socage, he must have Lands held *in capite* at the same time, and therefore the time of having Lands to devise, and holding of other Lands *in capite*, and disposing of the Lands to be devised, must concur. And therefore if a man be seised of an acre of Land in Fee, held of the King in Chief by Knights service, and of other two acres in Fee held in Socage, and enfeoff his younger Son of the acre held *in capite*, and of one of the other acres, or convey it to the use of his wife, or for the payment of his debts, &c. and after purchase Lands held in Socage; in this case he may devise all the new purchased Land held in Socage without restraint. So if a man be seised of Lands held by Knights service *in Capite* in possession, reversion, or remainder, and of Lands held in Socage, and by his Will in writing, doth devise all the said Lands, and after the Land held *in capite* is recovered from him, or aliened by him *bona fide*, in these cases,

Co. 10. 85.
82.
Super Lit.
111.
Co. 3. 35.
30. 34.

Co. 10. 87.
11. 24. 3.
30. 34. 35.
Super Lit.
117.
Dier 158.

cases,

cases the Devise is good for all the Land held in Socage: And hence it is, That if the King grant Land to one in Fee-farm to hold in Socage at a rent, and after grant this rent to another and his Heirs, to hold *in capite*, and the Grantee of the Rent doth grant it to him that hath the Land; in this case, because the Rent is extinct, and he cannot be said to hold Lands *in capite*, this shall not restrain the Devise of any of his Lands. And yet if a man hold some Lands by Knights service *in capite*, and other Lands in Socage, and be disseised of the Lands held *in capite*; he cannot devise all his Socage Land, but the Devise will be void for a third part, for he is said to have that land still, whereof he hath the right. And albeit the Statute say [That he that hath Lands held of the King *in capite*, and other Lands in Socage may give two parts for the advancement of his wife, payment of his Debts, preferment of his children] whereby he is restrained to devise any more. And therefore, if by act executed in his life time, he convey two parts to any such uses or intents, he cannot devise any more by his Will, but the residue must descend, yet this also is to be intended of the land he hath at the same time. For if a man be seised of land held in Socage of the yearly value of twenty pounds *per annum*, and he hath not any land held *in capite* by Knights service, and he make his Will in writing, and by it devise the Socage land to one in fee, and then purchase land to the value of twenty shillings *per annum* held *in capite*, and die; this will make the Devise void for a part of the land that is held in Socage: But if a man seised of Land in Fee of Socage Tenure, assure it to the use of his Wife for her Joynture, and after purchase lands held *in capite* by Knights service; he may devise two parts in three of all this *Capite* Land, and the King shall not have any thing out of or for the Socage land: If a man seised of Lands, part of which are held *in capite*, and part in Socage, make a Feoffment of the Lands held *in capite* (being two parts in three of the whole) to the use of him and his wife for life, with divers Remainders over; in this case he may not devise any of the Socage Land. And if a man have no Socage Land but *Capite* Land, and convey it away in Fee-simple, keeping no Reversion to any such use, and after purchase Socage land; he may devise all the Socage Land newly purchased.

6. As the Testator enabled to devise by this Statute without restraint, is, and must be one that hath the land he doth devise, at the time of the Devise made, and no other land then to be an impediment to his Devise so he must have a sole estate as well in the land he doth leave to descend to the Heir, as in the land he doth devise: And therefore, if lands held *in capite* be conveyed to a man and his wife, and the heirs of their two bodies; and this man hath other Lands whereof he is sole seised, held of the King *in capite* by Knights service; in this case he may not devise two parts of the whole, suppo-

sing this may suffice for the Kings third part, for he may devise but two parts of the residue; i. of that whereof he is sole seised, either at the time of making of the Will, or at the least at the time of the death of the Testator. 7. The estate of the land that is held must continue after the death of the Tenant: otherwise it will be no restraint. And therefore, if Tenant in tail be to him and the Heirs males of his body, the remainder in Fee to another, of lands held by Knights service *in capite*; and he is seised of other lands in Socage in Fee, and by his Will in writing devise all the Socage land and die without issue male; in this case, the devise is good for all the Socage land. And so also it is where the estate the Ancestor had of the land held is defeated by condition. 8. That which a man cannot dispose by any act in his life time, shall not be taken for any such Mannors, &c. Co. 10. 81. whereof a man may devise two parts by authority of this Statute at his death: And therefore in the case of an evident estate of Lands between husband and wife, where the husband can make no disposition for longer time then during the Coverture, these lands are not to be esteemed such as are to be accounted amongst the lands, whereof two parts in three are devisable. 9. The Tenure by Knights service must continue after the death of the Devisor, Co. 10. 84.
2. 34. otherwise the land so held will be no restraint. And therefore if the King grant land to one and his Heirs, to hold during his life by Knights service *in capite*, and after in Socage, or to hold during his life in Socage, and after by Knights service; in these cases, the Grantee may devise all his land, notwithstanding the Tenure of this land. 10. The King or other Lord must have a full and clear yearly value of the third part left to descend to him, and the value is to be esteemed as it is, and doth happen to be at the time of the death of the Testator, for the King, or other Lord must have the like or equal benefit for his third part, as the Devisee hath for the two parts without diminution or subtraction; when therefore a man will have his Devise good for the residue, he must take care that the third part be so left, for if the third part be not valuable, or be charged with any Rent, &c. or be upon any incertainty, as if it be upon a possibility onely, as where a man and be wife his seised of a joynt estate tail made during the coverture, and he devise other lands to her on condition that she shall waive her estate made during the coverture; and so intend that that part of his land shall be left for the Kings part, this Devise will not be good for the residue, and albeit the wife do waive the estate after the husbands death, yet this will not help the matter or make the Devise good for that part for which it was void before: But it is not material by what Tenure the third part descending be held: For it is held by the better opinion, That if a man be seised of 20 l. land held of the King *in capite*, and 10 l. land held of a Subject by Socage and he devise all the *capite* land

Land to a stranger; that this is a good Devise for the whole, and that the King shall be satisfied by the Socage Land. And if it be of the value of the third part, albeit it be but of an estate tail whereof the Ancestor was seised, or if it be new purchased land, yet it is sufficient: And therefore, if some lands be given to a man, and the Heirs of his body of the value of 10 l. *per annum*, and he be seised of other lands in Fee simple, to the value of 20 l. *per annum*, and all or part of these are held *in capite* by Knights service; in this case he may devise the lands in Fee-simple, and leave the entailed land to descend for a third part: And if a man be seised of such land, and convey to the uses within the Statute, or any of them, and after purchase new land, and leave that to descend, this is sufficient.

11. The third part that is left to descend to satisfy the King or other Lord must descend immediately, and he must not stay for it. And therefore if a man be seised of three acres of land held by Knights service *in capite*, and make a Lease of one acre for life, and after devise the other two acres; this Devise is not good for the whole two acres, but for two parts in three thereof only: And albeit the Tenant for life die afterwards, yet this will not help the matter. But if the Devisor leave a full third part immediately to descend in Fee-simple or in Fee-tail, he may devise the other two parts at his pleasure. And if he do not leave a third part to the full, it must be made up and supplied out of the other two parts; which in case of the King is done by Commission out of the Court of Wards, and in case of a Subject by Commission out of the Chancery. 12. As the third part left to descend, must be of as good value as either of the other two parts is at the time of the death of the Testator, or otherwise the Devise of all the residue will not be good, for so must it be taken out of the lands of the Testator indifferently: And therefore, if a man be seised in Fee of land held in chief by Knights service, and make a Feoffment of the one half of it to the use of himself for life, and after to the use of one he doth intend to marry, and after to the use of another in remainder, or to any other such like uses within the Statute, and after he doth marry the same woman, and after he deviseth the other moiety to his wife, children, or any other; in this case, albeit the wives estate have precedency, yet the King shall have the third part of both the moieties equally. So if one be seised of Gavelkind land held *in capite*, and, his son being dead, devise part of it to one of his Grandchildren, and part of it to another, and part to a third tail; in this case the Kings third part shall come of all the three parts equally, and accordingly the Devise will be void for so much to every one of them. So if one ho'd three several Manors of three several Lords; he cannot devise two of these Manors leaving a third to descend, but he may devise two parts of every of the three Manors, and a third part of each Manor must descend

Co. 3. 34.

Co. super
lik. 311. 9.
119. 3. 32.
30.

descend to each Lord, for there must be an equality in these things. For further illustration of which things, the examples following are to be heeded. *W B* being seised of the Manor of *Thoby in capite*, and of Lands in *Fobbing* held in Socage in Fee, and he and his wife being seised of the Manor of *Hinton*, held *in capite* to them and the Heirs of their two bodies begotten by an estate made to them, during the Coverture for the Joynture of the wife, the reversion to *W* in Fee, and *Thoby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W B* by his Will in writing, doth devise *Thoby* to his wife for life, upon condition that she shall not take her former Joynture, with divers remainders over and die, and she refused her former Joynture in *Hinton*; in this case it was adjudged that the Devise was not good for the whole Manor of *Thoby*, and that the Manor of *Hinton* was not a sufficient third part to descend. *LL* being seised on the Manor of *Affaland*, *Heauton*, *Rillaton*, *Pengelly*, *Willeworthby*, and *Trivesquite* (the last onely held *in capite*) in Fee, and having issue *Thomas* his eldest son, *William*, *Humphrey* and *Richard*, younger sons, which *Richard* had issue *Leonard*, makes a Feoffment of these Manors to divers uses, viz. of the Manors of *R*, *P*, *W*, and *A*, to the use of the Feoffor for life, and after to the use of such person as he should appoint by his last Will, and after to the use of *W* his second Son in Tail, and after to his other Sons in Tail, and after to the use of the Feoffor and his Wife in Tail, and after to the use of the Feoffor and his Heirs for ever. And of the Manor of *H* to such like uses, and of the Manor of *T* also to such like uses, and the same uses were with power of Revocation: And after the Feoffor purchased eight acres of other Land held in Socage, and after did revoke the uses of the Manors of *R*, *P*, *W*, and *A*, and after devised some of the said Manors (excepting some pieces) and the said eight Acres of Land to his eldest son and the Heirs males of his body for 500 years on certain Conditions, and if he die without issue, that it shall go to *William*, &c. and afterwards he died seised of the said eight acres of Land, and the Lands devised by the Will at the time of the death of the Testator were of the yearly value of 24 l. 14 s. 10 d. per annum, & non ultra, and the lands whereof the Feoffment was made, and not revoked, were at the time of the death of the Testator of the value of 55 l. 6 s. 8 d. in this case, it was adjudged that the Devise of the eight acres newly purchased was void at least for a third part, and restrained by the reversion in fee expectant upon the estate Tail made to the younger son of the Manor held *in capite*. And it was resolved, That if a man be seised of three Acres of equal yearly value, one of them held of the King by Knights service *in capite*, and have issue two sons, and give the acre so held; and another of the Acres to his younger son, whereby he hath so executed his

Co. 3 Butlers and Bakers case.

Co. 10. 78. Leonard Leoveis case. Co. 11. 14.

his power by the Statute, that he cannot devise by his Will any part of the third acre; and after he purchase three acres of equal value held in Socage; that in this case because he hath the Reversion in Fee upon the estate tail made to the younger son, he can devise no more but two parts of the said Land so newly purchased. But if the Reversion be gone before the purchase, he may devise the whole; but if a man be seised of Lands in Fee, part of which are held of the King *in Capite* by Knights service, and he convey two parts of it unto any of his sons, or to the use of his wife for life or in tail, in this case, albeit he may not devise any part of the residue, yet he may by his Will devise the Reversion of the two parts. And in case, where he hath not conveyed the full two parts, he may devise so much as to make up that he hath conveyed full two parts: And it was further resolved in the same *Leonard Lovell* case. That whereas the Statute saith, All persons, &c. having, &c. of any Manors, &c. in Possession, Reversion, or Remainder, &c. and the Feoffor *L L* in the case before had a remainder in tail expectant upon the estates in tail limited to the sons; that this remainder was not within the Statute, nor would have restrained the Devise, but for the Reversion in Fee afterwards. *A B* being seised in Fee of the manor of *Gracedin* held *in capite*, and of the value of thirty pounds *per annum*, and of the Manor of *Normanton* held *in capite* of the value of eighteen pounds *per annum*, in consideration of a marriage with *M*, did covenant to stand seised of the Manor of *G*, to the use of himself and the Heirs males of his body, on the body of the said *M*, and after to the use of *W B* his Brother, and the Heirs males of his body, and after to the use of another brother in tail, and after to the use of his own right Heirs, and of the Manor of *N* to the use of himself and *M* he is to marry, and the Heirs of his body, and after the Remainders as before of the other Manor, and after the Marriage is had, and *A B* doth purchase other Lands held in Socage of the value of Three pounds *per annum*, and then devised the same new purchased Lands; in this case, it was adjudged that the Devise [was] void for a third part of the Socage Land, in respect of the Reversion Dependunt upon the estate tail, and yet that it was a good Devise for two parts of the new purchased Land, albeit he had executed his power and given more then two parts to the use of his Wife. And in these cases where a man hath Land held *in capite*, and other Land, and he convey the Land held *in capite* to any of the uses within the Statute, as to his younger children or the like, or convey it with power of Revocation onely, so that he hath power of the Land still, and after he purchase Land held in Socage; in this case it seems he may devise all the land newly purchased, as if the Land were conveyed without such power of revocation, *A* being seised of land in fee held

Co. 6. 16.
super Lit.
114.

Co. 31. 23.
Hem. Har-
purs case.

Co. 10. 83.

Co. 6. 1171
Str Ed-
wards case

held of the King *in Capite*, made a Feoffment of two parts of it to the use of his wife, for her life, for her Joynture, and after made a Feoffment of the third part to the use of such person or persons, and of such estate and estates as he shall limit and appoint by his last Will and Testament in writing, and afterwards he did by his last Will in writing devise this third part to one in Fee; in this case it was resolved that the Devise was good for the whole third part. And yet if a man make a Feoffment in Fee of land held *in Capite* to the use of his last Will, albeit the Devise of the land be with reference to the Feoffment, yet it is void for a third part. *EB* being seised of six Manors, the one in Fee, and the rest in Tail with the Reversion expectant to him and his Heirs, and hath issue *T B*, divers of which Manors are held of the King *in Capite* by Knights Service, and every of them of equal yearly value, by his last Will in writing did devise all the said Manors to divers persons and their Heirs, for payment of his Debts, and advancement of his Children, and then died, and the estate in tail that descended to his issue was more then a third part of all; in this case it was resolved that the Devise was good for two parts of the Reversions, and for the entire Mannor in possession, and not void for a third part of the Mannor in possession, and for all the Reversions in Fee. A man being seised in Fee of Gavelkind Land in *Kent*, part whereof is held of the King *in Capite*, and part of Common persons in Socage hath Issue *A*, who hath issue *B C* and *D*, and *A* deviseth some of these lands to *B*, and some to *C*, and some to *D* his Grand-children in tail; in this case the Devise is void for a third part of the whole, as well for the land held in Socage as the land held *in capite*. And yet if in this case no Will be made, the King shall have but a third part of that which doth descend to the eldest son to the Heir at the Common Law, and not the third part of that which doth descend to the younger sons by Custom. And if lands devisable by Custom come into the Kings hands, and he grant them to hold of him *in capite*, and the Patentee devise them to the use of his wife, children, or for payment of his debts, &c. in this case the Devise is void for a third part: And here note, that in all the cases before where a man is restrained to devise a third part of his land, if he devise the whole, the Devise is good notwithstanding for so much as he hath power to devise. And as touching the thing devised is further to be known. 13. That a man must have right to, and possession of the land he deviseth, or else the Devise is not good. And therefore if a Disseisor devise the land he hath gotten by disseisin; this Devise as to the Devisee is void. And if a man be disseised of his land, so that he hath nothing but a right thereof left, and then he devise this right, or devise the land, this Devise is void. And if one contract for land, and pay his money for it, but hath

Co. ro. 11.
Trin. 34.
Eliz. 34.
Bed.
in fields
case.

Co. Rep.
Stam.
Pet. 5.

Plow. 485.

Nevils
case.

Devise of a
right to Land,
or of Land
that is another
mans.

hath no assurance of the land; and he devise this Land to another; this cannot be a good Devise of the Land, but perhaps the Devisee may in a Court of Equity compel him that hath received the money to assure and settle the Land according to the Devise. And if

one devise another mans Land, this Devise is void; but if he after the Devise made, purchase this Land, now is the Devise good. If a man bargain and sell Land to me on condition to re-enter, if he pay me ten pounds, and I covenant that I will not take the profits until default of payment, and he make a Lease of six years of it to another, and after break the condition, in this case I may devise this Land, and the Devise will be good. 14. A Seigniori, Rent,

or the like thing is devisable as Land is, and will pass without the Attornment of the Tenant. The like Law is of a reversion also.

And a man may devise a Rent *de novo* issuing out of land, or a Rent issuing out of Land that is in *esse* before. And therefore if a man

make a lease for life or years rendring Rent, the lessor may devise this Rent. So if a Rent be granted to one and his Heirs, the

Grantee may devise this Rent. So a man that is seised of Land in Fee may devise any Rent out of it at his pleasure. And therefore

if a man that holdeth his Land by Knights service in Chief by his Will devise any Rent, Common, or other profit out of it, this Devise is good, and that albeit the Rent or Profit doth amount to the

value of the whole Land; as if one had three acres of Land worth three shillings by the year, and he devise three shillings rent out of

it, this is a good Devise of the whole rent; but in this case the rent shall issue out of two parts of the Land, and a third part shall be free

and not charged with it, but he may charge two parts in three parts of such Lands at his pleasure. And so also it is if a man have Lands

holden by Knights Service, and not in *capite*, and other Lands in Socage, he may charge two parts of the Knights Service land, and all

his Socage land at his pleasure. And if a man have lands held in Socage, and no lands held in *Capite*, or by Knights Service, he may devise

what Rent he will out of it. But a man cannot devise a Rent, Common, or any such thing out of another mans Land that is none

of his own, nor out of that he hath not. And therefore if one devise

10/ out of his Manor of Dale, when in truth he hath no such Manor, this Devise is void. If a Rent be granted to me for the life of J S; it

seems I may not devise this rent, but that the terre tenant shall hold it as an Occupant. 15. Where a man is seised of a house in

Fee, and may devise the House it self, there it seems he may devise the Doors, Windows, Wainscot, or the like Incidents of the House.

And where a man may devise the Land it self; it seems he may devise the Trees or Grasse growing upon the Land, *Quando licet*

id quod majus, videtur & licere id quod minus. But where the Land it self is not devisable; there such things Incident or annexed to,

Devise of
Rent, Com-
mon, Seignio-
ry or the like.

Occupant.
Devise of house-
ses, doors,
glass, wains-
cot, &c.

Flow. 344.
Fin. De-
vis. 7.

Adjudged
Dowry &
Babemant
case.

Perk. 60.
518.
Lin. 60.
45, 516.
Dier 253.
240, 552.
F.N.B. 121.
Co Super
Lit. 118.
842, 333.

Dier 252.

Co. 4. 61.
Perk. 60.
515, 518.
Co. 11.
Rich Li-
fords case.
Holv. 38.

Devise of a
Use.

Devise of
goods and
Chattels.

Devise of
Debts and
things in action,
possibilities
and incertain-
ties.

or growing, or being upon it, are not devisable. And therefore the tenant in tail, for life, or years of land may not devise the houses, or windows, doors or waincoat of houses, or trees, or grass being or growing thereupon, but this Devise is void. 16. Where a man hath a Use that is not executed by the Statute of Uses, but remains at the Common Law, he may devise it, as he may any other thing. And therefore if one be possessed of a term of years, and grant it over to another to the use of the Grantor, he may dispose this Use by his Will, for it is in the nature of Chattel. But if a man have such a Use in Joyntenancy he cannot devise it. 17. All manner of Goods and Chattels real and personal may be devised by Testament. And therefore Leases for years of Lands, Grants for years of Rent, Common, or the like, Wardships of the bodies and Lands of Heirs of Tenants by tenure *in Capite*, and by Knights Service, Cattel, as Oxen, Sheep, Horses, &c. Gold, Silver, Money, Plate, Household stuff, as Beds, Pots, Pans, Platters, &c. Corn, Wooll, and Implements of husbandry may be devised by Will, and not onely those a man hath at the time of the Devise, but those a man is to have or may have afterwards. And therefore it is held a man may give his corn that shall grow in such a ground the next year after his death, or the wooll or lambs his flock of sheep shall yield the next year after his death, and that these Devises are good: But if in this case there shall be no such corn growing in that ground, or any lambs or wooll arising out of his flock that year, the Legacy is fruitless. And yet if the Testator devise to I S. twenty quarters of corn, or twenty lambs and doth will that the same shall be paid out of his corn that shall grow, or out of his flock the next year, and there be not so much corn, or not so many lambs, or not any at all growing or arising, yet this is a good Devise, and the things must be paid. In like maner if a man give to I S. a horse, or a yoke of oxen, in this case, albeit the Testator have neither horse nor yoke of oxen, yet the Devise is good and must be performed. 18. Things in Action, as Debts, and the like, albeit they be not grantable by Deed in the life time of the party, yet are they devisable by Will. And therefore if the Testator doth by his Will give any Debt due to him on an Obligation, or on a contract, or the like, this Devise is good. And the thing devised may be had thus, the Testator may if he will make the Legatary Executor as to that Debt, or if he do not, the Legatary may sue the Executor in the spiritual Court, or in some Court of Equity, and thereby compel the Executor either to recover it himself, and so to pay it to the Legatary, or to give the Legatary power to sue for and recover it himself in the Executors name. But if it be such a cause of Action, as is altogether uncertain, as where a man may have an action against another, for taking away his goods, or to compel him to make an account or the like, this is such a cause of action as is not devisable.

And

Perk. Sec.
417.
Lit. Bro.
Sec. 437.
Dier 292.
Flow. 330.

And yet possibilities and incertainties are in divers cases devisable. And therefore if one have money to be paid him on a Mortgage, he may devise this money when it comes; as if I Enfeoff a stranger of Land upon condition that if he do not pay me 20^s. such a day that I may re-enter, in this case I may devise this 20^s. if it be paid, and the Devise is good, albeit it be made before the day of payment come.

Child
case 17 Ja.
2. R.

And if a man be possessed of a Term of years, and devise all the residue of that Term of years that shall be to come at the time of his death, this Devise is good, and yet such a Grant by Deed is void. Grant.

Perk. Sec.
330, 321.
Lit. See in
Grant.

But a meer possibility, and a thing altogether incertain is no more devisable by Will, then is grantable by Deed. 19. Emblements, i. the corn that is sown and growing upon a mans ground at the time of

Devise of Em-
blements.

his death, and which himself should have reaped if he had lived to the Harvest (as in most cases he shall where he doth sow it) are devisable. And therefore if a man have land in Fee simple, Fee tail, for life or years, and sow it with corn; he may devise the corn at his death to whom he please. And yet if Lessee for years sow his Land so little while before his term expire, that it cannot be ripe before the end of the term, and he die, it seems he cannot devise this corn, for if he had lived he could not have reaped it after the end of the Term. 20. Obligations, Counterpanes of Leases, and

Perk. Sec.
327.

such like things also are devisable; but in this case the Devisee cannot sue upon the Obligation in his own name, nor enter for the condition broken upon the Lease if there be cause, but he may cancel, give, sell, or deliver up the Obligation, or Counterpane to the Obligor, or Lessee. And finally, whatsoever shall come to the Executor after the death of the Testator in the right of his Executorship, may be devised by the last Will and Testament of the Testator.

Devise of Ob-
ligations.
Counterpanes
of Leases, &c.

See infra
in sum.

Perk. Sec.
336 Lit.
Sec. 389.
Doct & St.
167.

21. The Goods and Chattels that a man hath jointly with another are not devisable. And therefore if there be two Joyn-tenants of goods or chattels, as where such things are given to two, or two do buy such things together, and one of them devise his part of the things to a stranger, this Devise is void. Inasmuch that if in this case the Testator make the other Joyn-tenant his Executor, the Will as to this is void, and he shall not be charged as Executor for those goods, but he shall have them altogether by right of Survivorship.

Devise of the
things a man
hath in Joyn-
ture with an-
other.

Mow. 539.
Bro. Ad-
ministr 7.
Fitz. Adm.
9.

22. The goods and chattels that a man hath in anothers right are not devisable; and therefore an Executor or Administrator cannot devise the goods and Chattels he hath as Executor or Administrator, for such a Devise is void. Howbeit the Executor may appoint an Executor of the goods of the first Testator which the Administrator cannot do and of the profits that do arise by the goods and chattels the Executor or Administrator hath during the time of his Administration he may make disposition. The goods and chattels belonging to Colleges & Hospitals may not be devised by the Testaments of the

Devise of the
things a man
hath in ano-
thers right.

Husband and
Wife.

Devise of
things that
are incident
and annexed
to some other
thing.

Devise of
things that are
not the Devise-
sors, or belong
not unto his
Executors.

Devise of a
Presentation
to a Church.

Mistake or er-
ror in the
thing devised.

Masters or Governors thereof, not the goods and chattels belonging to other Corporations by the Mayors, Bayliffs, or Heads thereof. And the goods and chattels that Churchwardens have in the right of the Church are not devisable. * All the Chattels real that a man hath in the right of his wife by her means, and all the Obligations that are made to her alone before, or during the time of the Coverture, and the chattels real or personal that his wife hath as Executrix to any other, are not devisable by the Testament of the Husband. But all the Chattels personal that a man hath by his wife which she hath in her own right, and the Debts due upon Obligations made to the husband and wife both, during the coverture, are devisable by the Testament of the husband. 23. Such things as are annexed, and incident to a Freehold or Inheritance, so that it cannot be severed from it by him that hath the property of them, as wainscot, and glass to houses, and the like, are not devisable, but in such cases where the thing itself to which it is annexed is devisable. 24. The goods and chattels that are another mans, are not devisable, and therefore if a man give another mans Horse, it is a void Devise. So if one devise the things that by special custom of some places, as the Heir Looms do belong to the Heir, this Devise is void, for it is not devisable from him. 25. If a Bishop have a Ward belonging to his Bishoprick fallen, he may devise it; but if a Church of his become void in his life time he cannot devise the Presentation. If a Parson of a Church have the Advowson in Fee, and he devise that his Executors two or three of them shall present at the next Avoidance; this is a good Devise. 26. All these things before that are devisable, when they are devised must be named, and devised either by their proper name, or otherwise described by some other matter whereby the mind of the Testator may be known and discerned; for if he err and mistake in the name or substance of the thing devised, or it be so incertainly devised or described that it cannot be perceived what he intendeth, the Devise is void. And therefore if one devise a piece of ground by the name of Messuage, except it be so called, the Devise is void. And yet by the Devise of the use, profit or occupation of Land, the Land itself is well devised; and by the Devise of Land itself, the reversion thereof may be devised. But if one intending to devise a Horse, doth devise an Ox: or meaning to give gold, doth give apparel; these Legacies are void unless his meaning may appear by some circumstance to be otherwise; as if a man have but one horse, and he be called *Arundel*, and he devise his horse *Encapal*; this Legacy is good enough. And if a man give all his money in such a Chest, when in truth there is no money in that Chest, or give to another the 10 l. which I doth owe him, when in truth I doth not owe any such money; this Devise is void. And yet if the Devise be thus, *viz.* I give to A B ten pounds, and

Dod. 232.
lib. 1. c. 19.
Perk. 606.
496. 497.
499.
* Perk. 610
360. Dod.
& 342. c. 7.

Perk. 408
526.
Keiw. 22.
See before

Plo. Gran-
thams case
Co. super
Lit. 185.
Co. super
Lit. 300.

Finn. 193.
Curia 11.

Swinn. lib.
7. c. 1.
Plover. 139.
Perk. 500.
500.

I will that the same be paid of the money I have in such a Chest, or of the money which such a man doth owe me; in this case the devise, is good, albeit there be not any money in the Chest or owing: And if one give 10 l. remaining in such a Chest, whereas in truth there is but 5 l. in the Chest; in this case the Legacy is good for the 5 l. But error and mistake in the quantity and quality of the thing devised, when the same for the substance of it is certain, doth not hurt: And therefore, if the Testator meaning to give the fourth part of his goods, give the one half; or meaning to give but 5 l. give 100 l. or *à converso*, meaning to give a greater, doth give a less quantity or sum; in these cases, the Legacy is good; and the Legatary shall have as much as the Testator did mean. If a man give his whitehorse, when in truth he hath but one horse and that is black; this is a good devise of this horse: And if the thing devised be under such general words that the minde of the Testator cannot be known by it, the devise is void: and therefore, if the Testator say, I do bequeath something, or I bequeath a substance, or I bequeath a body, or I bequeath, or the like; these devises are void for uncertainty: So if he say, I do give lands, or I do give goods; these devises are void: And yet if the Testator give a horse, an ox, a gold chain, or the like, indefinitely, in these cases the devise is good, albeit he have no such thing. But if one devise thus, I give lead, money, wheat, oyl, or the like, and say, not how much or what quantity; this Legacy is void for uncertainty, or at least the Executor may deliver what quantity thereof he will, and this shall satisfie the Legacy. 7. As touching the terms of a devise, it must be known, That if one devise any thing to wicked ends or upon wicked conditions, as to the end that the Devisee shall kill a man, or because he hath killed a man, or the like; these devises are void in like manner as it is when the cause or motive is false, as because one is my Cousin, or hath lent me money, I devise to him 20 l. and he is not my Cousin, or did not lend me money; these devises are void, And as touching the rest of the properties of a good devise, see them before in the properties of a good Testament: And here by the way, be advised if thou hast land to settle, rather to do it by act executed by advice of learned Counsel in thy life and health-time, and therein adde such conditions and provisoes of revocation and otherwise as thou wilt; or if thou wilt doe it by Will, then do it in thy perfect memory and by learned advice; let the Will be indented and of two parts, and leave one part with a friend that it be not suppressed after thy death; Let there be credible Witnesses to the publication thereof, and let their names be subscribed to it: Let the whole Will be written with one hand, and in one peece of paper or parchment for fear of alteration, addition, or diminution: Let

Uncertainty in the thing devised.

Seventhly, in respect of the Tenures and conditions, causes and ends of the devise.

A caveat for making of Testaments.

the hand and seal of the Devisor be set to it : And if it be in several parts, let his hand and seal and the hands of the Witnesses be to every part : If there be any raising or enterlining, let there be a *Memorandum* of it. And if thou make any revocation of thy Will, do it by good advise and by writing; *Vox audita perit, Litera scripta manet.*

8. The Exposition of Testaments and Devises, and how they shall be construed and taken.

Devises of Land. First in respect of the person that is to take by the Devise; and what, when, and how he shall so take by the Devise.

The general rules for the Exposition of Wills are these, That they must have a favorable and benign interpretation; and as near to the mind and intent of the Testator as may be: and yet so withall, as his intent may stand with the rules of Law, and be not repugnant thereunto. It is said to be therefore a maxime of Law, *Quod ultima voluntas testatoris perimplenda est secundum usum intentionis suam*, according to these Verses.

Sed legum servanda fides, suprema voluntas:

Quod mandas fierique jubet parere necesse est.

If a Devise be made of land to IS, and the heirs males of his body; by this Devise the sons and not the daughters of IS shall have the land. And if a Devise be made of land to IS, and the heirs Females of his body; by this Devise the daughters and not the sons of IS shall have the land. And yet it hath been said in these cases, that if in the first case, the Devisee have issue a daughter, who hath issue a son; or in the last case, hath issue a son who hath issue a daughter, that this son and daughter shall take by this Devise in these cases; but it seems the law is other wise.

Grant.

If a devise be made of land to IS and his heirs males, by this Devise I Shalt an estate Tail: but otherwise it is of such a limitation by Deed; for if one by deed give land to another and his heirs males, by this the Donee hath a Fee-simple, and his heirs general shall have it.

If a Devise be of land to IS, and to the eldest heirs females of his body; by this Devise all his daughters and not one of them only shall take it: So if one devise Gavelkind-land to a man and his eldest heirs; this doth not alter the custom; but by this all the sons shall take.

If a man devise his land to his wife for life, the remainder to his son and the heirs males of his body engendred, and for default of such issue the remainder to his next heir male, and the heirs males of the body of that heir male, and after his son die without issue (living his wife) and the devisor hath issue a daughter who hath issue a son; in this case and by this devise it seems the daughter and not her son shall have the land, and that in Fee-simple.

If a man devise his land to his wife for life, and after to his own right heirs males, and he hath issue three daughters, and after his death one of them hath a son; in this case, and by this Devise the

Plow. 540.
Coo. Super.
Lit. 322.

Terms of
the Law.
tit. Devise.
Coo. Super.
Lit. 25.
Plow. 414.

27 H. 8.
27.

Coo. Super.
Lit. 27.

Fitz. D.
vill. 2.

Trin. 9.
Adjudged.
Curteis
case.

the next collateral heir male of the Devisor, and not the son of the daughter shall have the land.

Dyer 122. If a man have issue two sons and a daughter, and devise his land to his wife for ten years, the remainder to his younger son and his heirs, and if either of the said two sons die without issue of their bodies, the remainder to the daughter and her heirs, and the younger son die in the life time of the father, and after the father die; in this case and by this Devise the daughter hath a good remainder, but it seems the elder son hath first an estate Tail by the intent of the Devisor.

Dyer 330. If a man devise some land to *A* his eldest daughter and her heirs, and if she die without issue, to *T* his youngest daughter and her heirs, and if she die within 16 years, that *A* shall have her part to her and her heirs, and if *A* marry such a one, that *T* shall have her part to her and her heirs; and if *T* die having no issue, that all her part shall go to *M* and *E* his Nieces; and if *A* die without issue, that *T* shall have her part to her and her heirs and *T* after the 16 years, doth die without issue; in this case the Nieces *M* and *E*, and not *A* shall have her part that is dead.

Peck. Sect. 565, 567. If land be devised to *A* for life, the remainder to a Monk for life, the remainder to *IS* in Fee; by this Devise he in the remainder in Fee, shall take presently after the first estate for life ended; and if the Devise be to a Monk for life, the remainder to *IS* in Fee, by this *IS* shall take presently.

Dyer 326. If a man devise his land to a woman and her brother, and the heirs of either of their two bodies, and for default of issue of the said woman and her brother, the remainder to the right heirs of the Devisor, and after the death of the Devisor, the brother dieth without issue, and the sister hath issue and dieth; in this case and by this devise, her issue shall have a moiety and no more of the land.

Dyer 304. If one devise two parts of his Land to his four younger sons in Tail, and that if the Infant in the womb of his wife be a son, that he shall have the fifth part as co-heir with the four, and if his five sons die without issue, that the two parts shall revert, and then the devisor dieth, and after a son is born, and after he, and three of the other sons die; in this case and by this devise the Infant shall not take any thing because he is incapable, and the two parts shall not revert to the heir until the five sons be dead without issue.

Adjudged
Ex. B. M.
26. 37 Eliz.
Browns
case.

If one devise the Manor of *Dale* to the eldest son of *IS* in Fee, and the Manor of *Sale* to *ID* for life, the remainder to such of the children of *IS* as shall be then living, and shall have the Manor of *Dale*, and the eldest son of *IS*, after the Testators death doth sell the Manor of *Dale*, and after *ID* dyeth; in

this case and by this devise none of the children of *I S* shall have the Manor of *Dals*, but it shall go to the heirs of the deviser.

If one devise his land to the children of *I S*, by this devise the children that *I S* hath at the time of the devise, or at the most the children that *I S* hath at the time of the death of the Testator, and not any of them that shall be born after his death, shall take.

If one have two daughters by divers women, and devise a moyety of his land to his wife for seven years, and that the elder daughter shall enter into the other moyety at her day of marriage, and if his wife be with childe of a daughter, that then she shall have an equal portion with the other sister, and the deviser dyeth and the wife doth enter and hath not a daughter, and then the elder daughter doth take a husband, and enters upon a moyety, the younger daughter dies without issue, and the seven years expire; in this case and by this devise, the collateral heir of the younger daughter shall have the moyety of the whole, and not the moyety of a moyety onely, and that by descent.

If a man have issue *B C* and *D* sons, and he devise his land to *D* his son, the remainder *proximo de sanguine*. or to the next of blood of the Testator; in this case and by this devise *B* shall take after the death of *D* as the next of blood. In like maner, if the Testator have four daughters, and he devise his land to the youngest in Tail, the remainder to the next of blood; by this devise the eldest daughter and not all the rest shall have the land: And if the Testator have issue *B* his elder son, and *C* his younger son, and *B* have issue *D* his son, and *B* is attainted and dyeth, and the Testator deviseth his land to *I S* for life, the remainder to the next of blood of the Testator; by this devise *D* and not *C* shall have the land.

Curia B. N.
Mich. 20.
Jac.

If a man have issue *B* and *C* sons, and *D* a daughter, and devise his land to *C* for life, and after that it shall remain to the next of blood to his children, to the next heirs of the blood of his children and *C* dyeth, and *B* dyeth without issue, and *D* hath issue a daughter in this case and by this devise, the heirs of *A* shall not take, but the next of blood to the children of *A*, which is the daughter of *D*, and his children themselves are excluded, and if the sons have any issues living, they shall take with her by this devise.

Bro. Df.
fient. Pl.
19. 8. All.
Pl. 6.

If the Testator have issue by *A* his first wife, three daughters, *Joan*, *Elizabeth*, and *Anne*, and by *B* his second wife, *Alice* and *Elizabeth*; and by *C* his third wife, *William* a son, and three daughters, *Mary*, *Katherine*, and *Johan*; and he devise his land to *Johan* his youngest daughter for life, paying 13 s. 4 d. to the son, and after her death to the son and the heirs of his body, and after his death

Adjudged.
M. 20. Jac.
perin. ver.
sus Pearis
B. R.

with-

without issue to *Elizabeth* the daughter of the second wife, and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the Devisor for ever, and the elder *Joan* hath issue *I P*, and dyeth, the son dyeth without issue; the younger *Joan* hath issue and dyeth, *Elizabeth* of the first wife hath issue and dyeth; *Anne* dyeth having issue, *Alien* dyeth without issue, *Mary* and *Elizabeth* born of the second wife dye without issue, *Katherine* dyeth without issue; in this case and by this devise the son and heir of the elder daughter after the death of the son without issue, and of *Elizabeth* and *Mary*, and not all or any of the children or their children, shall have the Land, because *proximo* in Latin doth denote a person certain; and there be expresse Devises to others: But if in this case the remainder be limited in general to the next of blood without any other matter, all the daughters perhaps may have it as Joynt-tenants.

If a man have two sons and a daughter which hath two daughters, and he devise his land to a stranger for life, the remainder to his second son for life, the remainder in Fee to the next of blood to his son; in this case, if the eldest son dye without issue, the daughter and her daughters shall have the land.

Whatsoever will pass by any words in a Deed, will pass by the same words in a Will, and more also; for a Will is always more favorably interpreted than a Deed; and therefore if a man devise the profits, use, or occupation of land; by this Devise the land it self is devised.

If a man devise thus, I give all my Lands to *IS*, or I give all my Tenements to *IS*, or I give all my Lands and Tenements to *IS*; by this Devise is given, and *IS* shall have not only all the Lands whereof the Devisor is sole seized, but also all the Lands whereof he is seized in common or coparcinery with another, and not onely the Lands he hath in possession, but also the Lands he hath in Reversion of any Estate in Fee-simple; but by this Devise regularly, Leases for years of Lands will pass.

If a man devise thus, I give all my land in possession onely; by this Devise there is given the Lands he hath in possession onely, and none of the Lands he hath in Reversion.

If a man be seized of Land in Fee-simple in *Dale*, and devise thus, I give all my Lands in *Dale* to *IS*, and after the *V Vill* made and published, he doth purchase other Lands in *Dale* and dyeth; in this case and by this devise *IS* shall not have the new purchased lands; and in this case it hath been held further, That if the Testator do by word of mouth after the purchase of the same Lands declare himself to be minded that *IS* shall have the same new purchased Lands also by this Devise, that notwithstanding *IS* shall not have them by this Devise: And yet it hath been adjudged, That if in this

Secondly, in respect of the thing devised.

Fitz. De-
vise 9.
Perk. Sect.
308.

See in the
Expositi-
on of
Deeds su-
pra.
Co. 8. 94.
Flow 525.
Mevils.
case. Fitz.
Devise 4.
Browne
41.

Flow. 66.

Flow. 343
344. old
N. 8. 89.
Fitz De-
vise 17.

*Fin. 37.
Eliz. B. R.
Brockford
verges Pa-
rimore.

case one come to the Devisor to buy his new purchased Land, and he say nay, but *I* shall have it as the rest, that this is a new publication of the Will, and that *I* by this devise shall have these new purchased Lands; for a new publication of the Will in these cases will make the Land to pass. But if a man devise the Manor of *Dale*, and at the time of the devise he hath it not, or devise his Lands in *Dale*, and at the time of the devise he hath no Lands there, and afterward he doth purchase the Manor of *Dale*, or Lands in *Dale*; by this devise, and in this case the Manor and the new purchased Lands will pass; for in this case it shall be intended he meant to purchase it. And yet the Statute enabling a man to devise Lands, saith, *Any person having* See before
ving. &c. Co. 3. 30.

If one have an ancient Tenement, and Lands belonging to it, and then purchase more Lands, and occupy them altogether with the Tenement many years, and being all thus in his occupation, he doth make a devise after this maner, I give my Tenement in *Dale*, and all my Lands belonging to it now in my occupation, to *I*, by this devise *I* shall have the ancient Land onely, and none of the new purchased Land; but if there be no ancient Land belonging to the Tenement, but new purchased Land onely, there perhaps it may be otherwise, for in this case the words cannot else be satisfied. As in case where a man hath some Lands in Fee-simple, and other Lands for years onely in *Dale*, and he devise all his Lands and Tenements in *Dale*; by this devise the Lands he hath for years doth not pass; but if he have no other Lands in *Dale*, but these Lands, in this case perhaps this Land will pass.

If one have a moiety of Lands in *Essex*, and a moiety of Lands in *Kent*, and he devise thus, I give my moyeties, and all my other Lands in *Kent* to *I*, it seems by this devise the moyeties in both Counties do pass, and that *I* shall have both the moyeties. In Nevils case,

If a man be seized in Fee, in possession of the moiety of a Farm called the Farm of *C*, and of the Reversion in Fee of the other moiety, expectant on a lease made to *A* and *B* for their lives, and he make his Will thus, I will that my wife shall have all my living, which I now occupy, untill my son come to 21 years of age, and then I will have her have the thirds of all my Living, and that my son shall have all my Farm of *C* to him and his Heirs; by this devise if *A* and *B* dye before the Heir be of 21 years of age, the wife shall have the thirds of the whole Farm, and not of the moiety in possession onely. Plich. 20. Jac. Adjudged Scattergoods case.

If a man be seized of Land in a Village, and in two Hamlets of the same Village, and he devise all his Lands in that Village, and in one of the Hamlets, by this devise none of his Land in the other Hamlet doth pass. Dyer 261.

If a man make his Will the first day of *May*, and thereby give the Manor Plow. 342

Manor of *Dale* to one in Fee, and the tenth of *May* one of the Tenancies escheat, and the 20 of *May* the Devisor dyeth; in this case and by this devise, it seems the Devisee shall have the Tenancy that doth escheat.

Lit. Bro. 133. If one devise his Land thus, I give my Land in *Dale* to *IS* and his
Sect. 133. Heirs, or to *IS* in Fee, or to *IS* in Fee-simple, or to *IS* for ever,
Perk. Sect. 133. or to *IS* *Habendum sibi & suis*, or to *IS* and his Assigns for ever;
L. 6. Lit. 586. or thus, I give my Land to *IS*, to give, sell, or do therewith at his
Kelw. 43. pleasure; by all these, and such like devises, a Fee-simple Estate is
Co. Super. 19. made of the thing devised, and *IS* shall have the same to him and
Lit. Bro. 133. his Heirs for ever. But if Land be granted by Deed after this maner,
Sect. 433. *IS* by this grant in all these cases, except onely in the first case, hath
19 H. 8. onely an Estate for Life. * And if a man devise his Land to *IS*, and
Fitz. De- say not how long, nor for what time, by this devise *IS* hath an Estate
wife 111. for life onely in the Land.

3. In respect of the estate and time that is devised. Fee-simple.

Deed.

Co Super. 19. If a man devise his Land to *IS* and his Assigns, without saying
Lit. 9 Perk. [for ever] it is said by some, that by this devise *IS* hath onely an
Sect. 57. Estate for Life. * But the contrary is affirmed elsewhere, and that it
133. New is a Fee simple.

Terms of the Law. 11. Devise. If one devise his Land to his wife, to dispose thereof at her will and
* Tr. in a. pleasure, and to give it to one of her sons, in this case, and by this
C. B. R. devise, she hath a Fee-simple; but it is qualified, for she must convey
Reply and it to one of her children. and cannot convey it to another.

Daniels c. 16. If one devise his Land to *IS*, paying 10 l. and use no other words,
Co. 6. 16. by this devise the Devisee hath the Fee-simple of the Land, albeit the
* Adjudge 10 l. be not the hundredth part of the worth of the Land. * And yet
Bill. 16. if one devise his Land to *IS* for his life, paying 10 l. by this devise
Eliz. Co. B. *IS* shall have an estate for life onely.

If one devise Land of the value of 30 l. *per annum* to *IS* for life, the remainder to *ID* paying 40 l. to *W*, by this devise *ID* shall have the Fee-simple of the remainder upon condition.

Hil. 17 Ja. If one have two sons, and he devise his Land first to his wife, and
B. R. ad- then he saith thus: In like maner, I will that my son *A* shall have it
judged after my wives death; and if my wife dye before my son *B*, then that
Spicers my son *A* shall pay to *B* 3 l. by the year during the life of *B*, and
case. also 20 l. to *W*; by this devise *A* shall have the Fee simple of this Land.

Guria M. 18. Jac. B. If one devise his Land thus, I will my Land to my son *W*, for his
R. Green life, and after his death to my son *T*, and if my son *W* purchase
versus. Land as good as that Land for my son *T*, then that my son *W* shall
Dewel. sell the Land devised to my son *T* as his own, and I will that my son
W shall pay to his Sisters 10 l. by 20 s. a year; in this case, and by this
devise *W* hath a Fee-simple, for power to sell giveth by implication
an Estate in Fee-simple, and it is paying also, &c.

If one devise Land to his wife and her Heirs, and if the Heir put her

out that she shall have other Land: by this devise she hath the Fee-simple of the first Land, and is not abridged by the latter words.

Pasch. 18.
Jac. B. R.
Curia.

If one devise his Land thus, I give whiteacre to my eldest son and his Heirs for his part: *Item*, Blackacre to my youngest son for his part, by this devise the younger son shall have the Fee-simple of Blackacre: So, if I give Whiteacre to I S. *Item*, Blackacre to I S and his Heirs; by this devise I S shall have the Fee simple of Whiteacre also.

Trin. 10.
Eliz.

If one give Land to his wife for life, the remainder to his son and the Heirs males of his Body, and for want of such issue, the remainder to the next Heir male of the Donor and the Heirs males of his body; it seems by this devise, that the next Heir male of the son hath a Fee simple.

Perk. Sed.
566.

Fee-tail.

If one devise his Land thus, I give my Land in *Dale* to I S, and to his, or [to the] Heirs males, or Heirs females of his body, [or of his body begotten] or to I S and his issues male, or his issues female; or to I S and the Heirs males of his body begotten on M; or to I S and E his wife, and the Heirs males, or Heirs females of their two bodies begotten; or to I S and his Heirs, if he shall have any Heirs of his body, else that the Land shall revert; or to I S and his Heirs if he have any issue of his body; or to I S and the right Heirs males of his body; or to I S and his Heirs provided that if he dye without Heirs of his body, that the Land shall revert; by all these and such like devises an Estate Tail is made of the thing devised, and I S the Devisee, shall have the same accordingly.

Co. Super.
Lit. 3. 16.

Deed.

If one devise his Land thus, I give my Land in *Dale* to I S & *semini suo*; by this devise I S hath an Estate tail: But if he say, I give my Land in *Dale* to I S & *sanguine suo*: it is said by this devise I S hath the Fee simple of the Land. If one devise his Land to I S & *exilibus*, *vel pralibus de corpore suo*; by this devise if I S have no children at the time, it seems he hath an Estate tail; but by such a limitation by deed is made onely an Estate for life. If one devise his Land thus, I give my Land in *Dale* to I S for life, the remainder to I D and E his wife and their children; or to I D and E his wife and their men children; or to I D and E his wife and their issues: by these devises if the husband and wife have no children at the time of the devise, is created an Estate tail; and if they have any children at the time of the devise, then hereby is created an Estate for all their lives only in Joynt tenancy. And if Land be devised to A for life, the remainder to B, and the Heirs of his body, the remainder to I S and his wife, and after to their children, by this devise I S and his wife have Estates for their lives onely, and their children after them Estates for their lives joyntly: And albeit they have no children at the time, yet every child they shall have after, may take by way of remainder. And so also it seems is the Law upon such a limitation by Deed.

Co. Super.
Lit. 9 Bro.
tit. tail. 2.
Co. Super.
Lit. 20. 6.
16.

Deed.

If

Lib. Sec. If Lands be devised to *I S*, and his Heirs males, of his Heirs
31. 9 H. 6. females, without saying [of his body,] by this devise *I S* hath
35. 29. H. an Estate Tail. But if such a limitation be by Deed, it is a Fee-
1. 27. simple.

Hill. 22. If one have two sons, and devise Whiteacre to his eldest son and
Jac. B. R. his Heirs, and Blackacre to his youngest son and his Heirs, and if
Daniels either of them dye without issue, then that the other shall be his
case. Heir; by this devise either of them hath an Estate Tail, and no Fee-
 simple.

Adjudg. If one have Land in *Kent* in *W S* and *T*, and have one male childe
M. 9 Jac. and a daughter, and his brother hath three children, *B, C*, and *D*, and
Wallo, 1 he devise his Land thus; *Item*, I give my Land in *Kent* to my male
case. childe and his Heirs, and if he dye without heirs of his body, that
 the Land in *W* shall go to *B* and his heirs. *Item*, I will my Land
 in *S* to *G* and his Heirs, and my Land in *T*, to *D* and his heirs,
 in this case, and by this devise, the male childe of the Devisor hath
 an Estate Tail in all the Lands, and after his death without heirs, it
 shall remain according to the Will; So that if one devise his Land to
 his eldest son and his heirs, and if he dye without Heirs of his body,
 that it shall remain to his youngest son and his heirs; by this devise,
 the eldest son hath an Estate Tail, and the youngest son the Fee-
 simple.

Co. 9. 127. If one devise his land to his son *W*, and if he marry and have any
 issue male begotten of the body of his wife, then that issue to have it;
 and if he have no issue male, then to others in remainder; by this de-
 vise, it seems *W* hath an Estate Tail to him and the issues male begot-
 ten on the body of his wife.

Perk. Sec. If one devise Whiteacre to *I S* and the Heirs of his body, and then
56. 10 H. after saith thus, and I will that *I D* hath Blackacre in the same
436. maner that *I S* hath Whiteacre; by this devise *I D* hath an Estate
 Tail in Blackacre as *I S* hath in Whiteacre *Et sic de similibus.* * And
 * *Tr. 30.* if one devise Whiteacre to *I S*, and then say; *Item*, Blackacre to
I S and the heirs of his body; by this devise he hath an Estate Tail in
 both Acres.

alia. If one devise his land to his wife for years, the remainder to his
 younger son and his heirs, and if either of his two sons dye without
 issue; &c. that it shall remain to his daughter and her heirs, and
 the younger son dye in the life time of the father, and after the fa-
 ther dyeth; it seemeth by this devise the elder son shall have the land
 in Tail.

Dyer 121. If one devise his land to his wife for life, and after to his son,
Adjudg. and if his son dye without issue having no son [or having no
Tr. 9 Jac. male] then that it shall go to another; by this devise the
Co. 8. son hath an Estate Tail to him and the Heirs Males of his
Robinsons body.
case.

If

If Lands be given to a man and woman unmarried and the Heirs of their two Bodies, or to the husband of *A*, and wife of *B*, and the Heirs of their two Bodies; by these Deviles are made Estates in Tail.

Co. super
Lit. 20. 21.
Plow. 35.

If a man devise Whiteacre to his three brothers, and Blackacre to *C* his brother, so as he pay 10 *l.* to *I S* and otherwise that it shall remain to the house, provided that the same Lands be not sold, but go unto the next of name and blood that are males, if it may be; it seems that by this devise *C* hath an Estate Tail in Blackacre, and that if he dye without Issue, it shall go to three other brothers and their Heirs males in Tail one after another: and that Whiteacre also is so entailed in every of their parts. For the words [shall remain to the house] shall be construed to the most worthy of the Family, and the words [that are males] shall be construed in the future Tense.

Adjudg.
14. Eliz.
Co. B. &
Tinn. 9.
Jac. B. R.

If Land be devised to *I S* and the Heirs of his Body, and that if he dye, that it shall remain to *TD*, by this Devise *I S* hath an Estate Tail, and the latter words do not qualifie the former, but *TD* must attend his death without Heirs of his Body before he shall have the Land.

If Land be devised to *I S* and the Heirs males of his Body, and if it happen that he dye without Heir of his Body, that it shall go to *H* and his Heirs; by this Devise *I S* hath an Estate to him and the Heirs males of his Body, and the subsequent words do not alter nor enlarge the Estate.

Dyer 171.

If Land be devised to *I S* and *E* his wife, and to the Heirs of the body of the Survivor of them; by this Devise the Survivor shall have a general Estate Tail.

Co. super
Lit. 26.

Deed. If Land be devised to *I S* and the Heirs he shall have by *A* his wife; by this Devise *I S* hath a Fee-tail, and not a Fee-simple as he hath in case of such a limitation by deed.

Co. super
Lit. 26.

If Land be devised to *I S* and to the Heirs of the Body of such a woman; by this devise *I S* hath an Estate Tail, and begotten, shall be intended begotten by him.

Co. super
Lit. 22.

If one devise Land to his Son and his Heirs, and that if his Son die within the age of 21 years or without issue, that the land shall remain over: and the Son dyeth within age having Issue, in this case and by this Devise the son hath an Estate Tail, and [or] in this place shall be taken for [and]

Adjudg.
M. 27. 28.
Eliz. Sale
versus
Gerrard.

Deed. If Land be devised to a man and his wife, and to one Heir of their body, and the Heir of the body of that Heir; by this Devise an Estate Tail is made in a Will as well as in a Deed.

Co. super
Lit. 22.

If a man devise his Land thus, I give White acre to *A* my son and his Heirs, Blackacre to *B* my son and his Heirs, and Green-acre to *C* my son and his Heirs, provided that if all my said sons die without issue of their Bodies, that then all my said Lands shall

M. 28. Jac.
B. R. Gu-
berts case.

go to *M* my wife and her Heirs, by this devise they have all of their estates in Tail of their land, and as it seems crois remainders to either of them of the land of each other.

Co. p. 128. If one devise his land thus, I give my land in *Dale* to *I S*, and if he dye without issue male of his body, then that it shall remain over to *I D*, by this Devise *I S* hath an estate Tail.

Eliz. Bro. 98. 48. Bro. De. vice. 98. Donec. 44. If a man hath issue three sons, and devise his land thus, viz. one part to two of his sons in Tail, and another part to his third son in Tail, and that neither of them shall sell his part, but that either of them shall be Heir to other, in this case and by this Devise either of them hath an estate Tail, and if one of them dye without issue, his part shall not revert to the eldest, but shall remain to the other son, for it is an implied remainder.

Co. Super. Lit. 26. If there be husband and wife, and they have issue a son and a daughter, and the husband dye, and land is devised to the wife and the heirs of her late husband on her body begotten, in this case, and by this Devise the wife hath onely an estate for life, the son an estate in Tail, and so also the daughter in case he dye without issue.

Co. Super. Lit. 147. 85. If one devise to *I S*, that if he and his heirs of his body be not paid 20 l. Rent yearly, he and they shall distrain, &c. by this Devise *I S* hath an estate Tail of his Rent. But if the Devise be that if *I S* be not paid 20 l. yearly, he shall distrain, &c. by this Devise *I S* hath onely an estate for life. So if one devise a Rent of 10 l. out of his land to be paid quarterly, and say not how long the Rent shall continue, this is but an estate for life. For life.

Fitz. De. vice. 16. Co. 6. 96. Perk. Sect. 377. If one devise his land thus, I give my land in *Dale* to *I S* for his life, or to *I S* [without any more words] or to *I S* and his Heir, in the singular number, or *I S* and his children, and *I S* hath children at the time of the Devise, or to *I S* and his Successors (*I S* being a natural person;) by all these and such like Devises *I S* hath onely an estate for life in the thing devised. * But if the Testator have onely a Term of years in the land whereof the Devise is made, and devise this land to *I S*, and doth not say for what time; it seems that by this Devise the whole Term is devised, unless the intent doth appear to be otherwise. And if one devise land (whereof a man is seized in Fee) to *I S*, paying 10 l. to *I D*, by this Devise, albeit there be no estate expressed, yet *I S* hath the Fee-simple of the land, in respect of the payment of the money. But if the intent of the Testator appear to be that *I S* shall have the land but for his life, *contra*; for there the consideration will not alter the estate expressed upon the gift.

Mich. 13. Jac. B. B. Dyer Sect. 97. If land be devised thus, I give my land in *Dale* to *I S* and his Assigns, [without more words] by this Devise is held to be given no more but an estate for life by construction upon a Will, as it is upon

See before Lit. Bro. 102. 406. 485. Deed. 1.

Co. Super. Lit. 9. 4. 39.

upon a Deed. And yet in the *New Terms of the Law*, this Devise, the contrary is affirmed. *See above.*

If one devise thus, I will that I S shall have and occupy my land in *Dale*, and say not how long; by this Devise I S shall have the land for his life. * But if I devise that I S shall enter into my land, and say no more; by this Devise I S hath no estate at all, but power to enter into the land onely. *Patche 9. Jac. Newmans case. Dyers 14.*

If a man have a son and a daughter and dyeth, and lands are devised to the daughter, and the Heirs females of the body of the Father; by this Devise the daughter, hath onely an estate for her life; for there is no such person for she is not Heir. *Co. Super Litt. 21. 2.*

If one devise his land thus, I give my land in *Dale* to I S for his life; and after to the next right Heir of I S in the singular number, and to his right Heirs for ever; by this devise I S hath onely an estate for life. So if one devise land to I S for life, and after to the next Heir male of I S, and to the Heirs males of the body of such next Heir male; by this devise I S hath an estate for life onely; but if it be thus, I give my land in *Dale* to I S for life, and after to the Heirs, or to the right Heirs of I S; by these devises I S hath the Fee-simple of the land; And if it be to I S for life, and after to the Heirs males of I S; by this I S hath an estate Tail *Co. 1. 64.*

By implication.

If one devise land to I S and E his wife, and after their decease, [or the remainder] to their children; by this devise, whether they have, or have not children at the time, I S and E his wife have estates for their lives onely. *Co. 6. 166.*

If one devise a Moyety of his land to his wife for life, and the other Moyety to his second son, and after by another clause doth devise it all to his son after the death of his wife: by this Devise the son hath onely an estate for life after the wives death, and no more. *Curia 9. Ja. Co. 2.*

If one devise his land to I S in Fee after the death of I B (being his son and Heir apparent;) by this Devise I B hath an estate for life by implication, and until the devise take effect, the Law gives it to him by descent. And so also it seems the Law is where one doth devise his land to I S after the death of his wife: that by this Devise the wife hath an estate for life by implication. And therefore if a man devise thus, I give my goods to my wife, and that after her decease, my son and Heir shall have the house where the goods are, it is held by this Devise that the wife hath an estate for life in the house by implication; for a man is bound to provide for his own wife. But if a man devise his land to I S after the death of I B, (a stranger to the Devisor;) it seems that by this Devise I B hath no estate at all by implication, and that this doth but set forth when the estate of I S shall begin, and that the intent of the Testator is that his Heir shall have it until that time. *Bro. De. wife 48. 53. Lit. Bro. 107. 13 H. 7. 13. New Terms of the Law tit. Devise Plow. 158. 414. 322.*

If one devise land thus, I give my land in *Dale* to I S, to the intent *Co. 6. 166. 20 Bro. 158.*

tent

tent that with the profits thereof, he shall bring up a child, or to the intent that with the profits thereof, he shall pay to *A* 10 l. or to the intent that he shall out of the profits thereof pay yearly 10 l. by these devises *I S* hath onely an estate for life, albeit the payments to be made be greater then the rent of the land: And therefore it is not like to the case before, where a sum of money is to be paid presently.

Dyer 357. If one devise his land thus, I give my land to *Alice* my Cousin in Fee-simple, after her decease to *W* her son (who is her heir apparent;) by this devise she hath an estate for life first, the remainder to her son for his life, the remainder to the heirs of *A* in Fee-simple: And so also is the Law when the devise is to any other after that manner.

Dyer 371. If my father be tenant for life of land, the remainder to me in Fee, and I devise this land to my wife, rendering for her natural life 40 s. to the right heir of my father; by this devise my wife hath an estate for life after the death of my father.

Co. 8. 10. If one devise his land unto his Executors, until his son shall come unto 21 years of age, the profits to be employed towards the performance of his Will, and when he shall come to that age, then that his son and his heirs shall have it; by this devise the Executors shall have it until he be 21 years of age, and if he die before that time, until the time he should have been 21 years of age, if he had lived so long; and [shall] in this case shall be taken for [should].

Co. super Lit. 43. If one devise his land to his Executors for the payment of his debts, and until his debts be paid; by this Devise the Executors have but a chattel and an incertain interest, and they and their Executors shall hold it until the debts be paid and no longer.

Co. 10. in Leonard Lovels case. 87. 46. If one devise his land to *I S*, and the heirs males of his body for the term of fifty years; it seems that by this devise, *I S* hath but a Lease for so many years, if the heirs males of his body shall so long continue, and that for want of issue male the term of years shall end: And in this case, the Executor or Administrator, not the heirs males of *I S* shall have it after his death

Executors.

Adjudged Lowen versus Cox. Mich. 37. 38 Eliz. Co. B. Dyer 15. Lit. Bro. Sed. 131. Lit. 283. Perk. Sect. 179. Dyer 381. Dye 336. If one devise his land thus, I give to *I S* and *I D*, and their heirs, my land in *Dale* equally; or my land in *Dale* to be equally divided; by these devises *I S* and *I D* shall have and hold the land, not as Joint-tenants, but as Tenants in common, so that the heir and not the survivor shall have his part that first dyeth: And yet in case of such a limitation by Deed, it is otherwise: And if one devise his land to *I S* and *I D*, and their heirs [without more words;] it seems that by this devise they shall take and hold as Joint-tenants. And yet if one devise land to *I S* and *I D* and the heirs of either of their bodies lawfully engendred, it seems

Fourthly, in respect of other matters.

that

that by this Devise *I S.* and *I D* shall take and hold as Tenants in common and not as Joint tenants. And if one devise his land to *I S* and *I D* thus, I will that *I S* and *I D* shall have my lands in *Dale*, and occupy them indifferently to them and their heirs.

Paſche 9.
Ja. New-
ma's cafe.

Devise of
goods and
chattels.
First, in re-
spect of the
person that
shall take by
the Devise.

If one be possessed of a term of years of land, and devise the same to his wife during all the years, and if she die within the years, then to *A* and *B* his two sons if they have no issue male; but if they or either of them have issue male, then that it shall go to the use of those issues male; and she die, and the two sons die without issue born one of their wives being privily with childe of a son, which after his death is born; in this case and by this devise this issue male shall have it as soon as he is born.

Hil. 12. Ja.
B. R. Ad-
judged.
Bland.
Forda case.

Executors.

Heir.

If one be possessed of a term of years, and he devise it to another and his heirs or his heirs males by this Devise the Executors or Administrators, not the heirs of the Legatee shall have it. And therefore, if Lessee for years of land devise all his interest therein to his wife if she live so long, and after her death, if any part of the term be to come, devise the same to *I S* his son and the heirs of his body, in this case and by this Devise, the executors and Administrators of *I S*, not his heirs shall have it, at least, so long as he hath any heirs of his body: And yet if one possessed of the term of years, devise it to *I S*, and after his death, that the heir of *I S* shall have it; in this case *I S* shall have so many years of the term as he shall live, and the heir of *I S* and the Executor of that heir shall have the residue of the term.

Co 10. 46
Lampen
et al. Pet.
Sed. 558
559.

If one give 10l. to the children of *I S*, and at the time of the Devise *I S* hath four children, and after before the death of the Testator he happen to have two more; in this case and by this Devise, the two children he hath afterwards shall have no part of the 10l. but those four he had before shall have it all.

Swin. 316.

If one give 10l. to his Parish Church, and at the time of the Will made, he live in one Parish, and after he doth remove into another Parish, and die there; by this Devise the Parish where he lived before, and not where he died, shall have this 10l.

Swin. 316.

Secondly, in
respect of the
thing.

If one devise a third part of all his goods and chattels; by this Devise some say, doth pass and is given no more but a clear third part after debts and Legacies paid; but it seems a third part of the whole is hereby devised, out of which the debts must first be paid by Law.

Dyer 19.
164.

If one devise to another all his goods and chattels, or all his plate, or all of any other thing in general, by this Devise doth pass and is given not only all the Testator hath of that thing at the time of the making of the Will, but also all he hath at the time of his death, and not only what he hath in possession, but also what he hath not in possession:

Plow. 341.
Swin. 318.

possession: But if one devise all his goods, or all his plate &c. in such a place, or in the occupation of I S; by this devise none other will pass but what are in that place, and in the occupation of I S.

If one have a Term of years of a Portion of Tithes in *Dale*, and have a term of years of land in *Dale*; and he devise all his lands and tenements in *Dale*, and all his estate therein to I S; by this Devise the portion of Tithes doth not pass, for it is neither land nor tenement: but by devise of all his hereditaments, perhaps it may pass *Sed Quere.*

If one devise to I S all his goods and chattels; by this devise doth pass and is given all his estate active and passive, (except land of inheritance and free-hold Estates, and such things as depend thereupon,) as Leases for years, Wardships by Tenure in *Capite*, or by Knights Service, gold, silver, plate, household-stuff, cattel, Corn, debts, and the like; and if one devise to I S all his goods, or all his chattels, by either of these is devised as much as by both of them.

If one devise to I S all his moveables, by this devise doth pass all his personal goods, both quick and dead, which either move themselves, as horses, sheep, and the like; or may be moved by another, as plate, household-stuff, corn in the garners and barns, or in the sheaf, &c. * also all Bonds and Especialties; and by a Devise of Immoveables doth pass Leases; Rents, Grats, and the like; but not any of those things that do pass by the devise of moveables; but debts will not pass by either of these Devises.

If one devise to another all his household-stuff; hereby doth pass his plate, coaches, tables, stools, forms, beds, vessels of wood, brass, pewter, earth, and the like; but not his apparel, books, weapons, tools for Artificers, cattel, victuals, corn, plow-geere, and the like; by a Devise of utensils, it is agreed that plate and jewels do not pass.

If a man devise to I S one of his horses, or a horse; by this Devise Election. I S shall have the election, if there be more then one, which horse he will have: but if the devise be thus, I will that my executor shall deliver to I S one of my horses; in this case, the Executor hath the election, and he may deliver which of them he will.

If one devise thus, I give to I S my corn growing in such a ground this next year; or the lambs of my flock this next year; by these Devises the Legatee shall have no more but what doth grow that year: But if he devise so many quarters of corn, or so many lambs; in these cases so much must be paid howsoever.

If one have a lease for years of land, and devise it to I S for life; Thirdly, in respect of the time, by this Devise the whole term is devised, and I S the Devisee shall have the whole term if he live so long, and yet I S shall not have

an

Deed.

an estate for life by this devise; and so also it seems the Law is upon a grant by deed after this manner: And if a man possessed of a term of years of land devise his term, or his Lease, or the land it self by a devise, in either of these terms the whole term doth pass.

If a man be possessed of two houses for years, and devise them to his wife for her life, if she live sole; the remainder to IS; and if she marry, then that she shall have one of them during the rest of the term, [and then addeth these words.] and also, I will that she shall have 20 l. a year out of my other lands; in this case and by this devise, it seems the Annuity shall continue during the term, *Sed Quere*, for the Judges were divided in this point.

If a Legacy be given, and no time is set for the payment or doing of it, if it be simple, it must be paid and done presently; if it be conditional, and upon a condition precedent, it must be paid or done the time the condition is first extant: and if there be a time set for the payment or doing of it, it must be paid or done at the time appointed, See more in Exposition of Deeds, Numb. 15,

9. Devise of lands to Executors or others to sell; or that Executors or others shall sell or otherwise dispose them: how this shall be taken, and what sale and disposition shall be good, or not.

Devise of Lands to Executors to sell, to pay Debts, Legacies. &c. are some of them after one maner, and some after another, for sometimes the devise is thus, I will that my Executors, or that A B and C my Executors shall sell my land; and sometimes the devise is thus, I give my land to my Executors to be sold, or to the end that they shall sell it; in the first case, the Executors have onely an authority and no interest, and therefore in that case the land doth descend in the interim to the heir of the devisor, and he shall have the profits of the land until it be sold; and if it be never sold he shall ever have the profits of it; and in this case, they may sell it when they will, if they be not hastned thereunto by order of Court, and when they do sell, they must all joyn in the sale by the Common Law, or otherwise the sale had not been good; and therefore if one or more of them had dyed before the sale, they that had survived or their Executors could never have sold it by this authority; so likewise if any of the Executors had refused the charge of the Will, the land could not have been sold by the rest, unless the words of the Will had been, that his Executors or some of them should sell it; for in that case, some of them even by the Common-Law it self might have sold, and now also by the Statute of 21 H. 8. cap. 4. some of them may sell it without the rest; as if one give his land to A for life, and that after his decease it shall be sold by his Executors, and make four Executors, and one of them die during the life of A, and then A dyeth, in this case, the other three Executors may sell: So if one give his land in Tail, and that if the Donee die without issue, that the lands shall be sold by his sons-in-law, and he have then five sons-in-law, and one of them die in the life time

of

Palschy 24.
Jac. B. R.
Gough
and
Hayward
c. 10.

Plow 540.
Swinh. 314

Co. super
Lit. 236.
112. 113.
15. B. 7.
12.
Dyer 177.
219. Kew.
107. 108.
Perk. Sed.
543-544.
Lit. Bra.
Sed. 376.
Kew. 40.
45.

of the Donee, and after the Donee die without issue; in this case, the other four may sell the land, and the sale made thereof is good: And yet if the words of the Will be, that it shall be sold by *A B* and *C* his Executors, or his sons in-law; in this case, if one of them die, it cannot be sold by the rest: but in the last case before, where the devise is, I give my land to my Executors to be sold, &c. The Executors have an interest in the land, and an authority about the land also, and therefore in this case, the descent is prevented, and the Executors shall keep it till the sale, neither will any disseisin, fine, recovery, or Feoffment by the heir, prejudice their interest, but that they may sell it when they will, but they must sell in time convenient, or otherwise the heir may enter and put them out by a condition in Law, that is annexed to the interest, or perhaps the heir may tender to them the worth of the land, and if they refuse to accept it, he may enter upon them, and out them: and it seems in this case, the mean profits until the sale is no Assets, but the money made upon the sale shall be Assets in their hand: and in this case, albeit one or more of the Executors die or refuse, yet the rest may sell it, even by the Common-Law itself, and so also by construction upon the same Statute, for the estate surviveth. But it seems they may not sell to him that doth refuse; neither may they in either case transfer their power to sell to any other, nor keep the land themselves, and pay so much of their own money as the land is worth.

Assets.

If one deviseth by his will, that his land shall be sold to pay his debts, and say not by whom; in this case it shall be sold by his Executors: and if one devise all his land except one Acre which he doth appoint to pay his debts, by this devise his Executors or the Survivor of them may sell it: but if one say by his Will, that *I S* shall have *tam gubernationem quam fructum meorum*, the disposing, letting and setting of my lands; by this devise *I S* hath not power given to him to sell the land.

If one devise that his land shall be sold after the death of his wife by his Executors with the assent of *I S*, and make his wife and a stranger his Executors and die, and after *I S* die, in this case, the land cannot be sold, for the authority is determined.

If one devise that his Executors shall sell the land, and with the money coming or made of it, shall pay such and such Legacies or sums of money, in particular to such and such persons by name; this is not a Legacy for which a suit lyeth in a Court Christian, but for this every one that is to have portion may have account against the Executors after the sale.

If one give lands to another, to give them again to the children of the Testator, or to dispose them at the Will of the Devisees to some of the children of the Devisor; in these cases, the Devisees

Gg

must

Perk. Sect.
547. Dyer
391. 26.

Dyer 219.

Dyer 151.
35.

Yrin. a Car.
B R.

must dispose it accordingly, and cannot give it to any other : And if one give lands to others, to the intent that with the profits thereof they shall educate children, or pay such sums of money, of the, &c. in this case, the Devisees must do accordingly, or they may be compelled thereunto. Co. 6. 16

And in all cases of Devises of lands to Executors to sell, it is wisdom to make it certain : *v. z.* that the Executors or the Survivor of them, or such or so many of them as take upon them the probate of the Will (if his meaning be so) shall sell it : And it is better to give an Authority, then an estate, unless his meaning be that they shall take the profits of the land untill the sale, and if he do so, then it is necessary that he appoint that the mean profits untill the sale, shall be Assets in their hands ; for otherwise it shall not be so.

Co. super
Lit. 115
113.

10. Devise upon condition, and what words in a Will shall be construed in the sense of a condition, and what not.

The same words that in a Deed will make a condition, and the thing granted thereby to be conditional, will make a condition in a Will, and the thing given thereby to be conditional : And therefore these words, *Provided on condition, So that, If, and the like* will make a condition in a Will : So that if one devise land to *I S* on condition, or *So that, or If, or provided* that he do bring up his eldest son, or pay his wife 20 l. a year for her life, or the like ; by these Devises, the estate is made conditional : Also other words that being used in a Deed will not make a condition, yet being used in a Will, make a condition, and the estate made by the Devise to be conditional ; And therefore, if a man devise his land to his Executors to be sold, or devise his land to them, or others to pay 20 l. to *I S*, or paying 20 l. to *I S* : in these cases, and by these Devises, the estates are made conditional, and of these conditions regularly the heir, and not a stranger shall take advantage. So as if one devise land to another, and his heirs, provided that he pay 10 l. to *I S*, otherwise that the land shall remain to *I D*, and his heirs ; in this case, if the Devisee do not pay the money, *I D* shall not take advantage of it, nor have the land according to the devise, but the heir of the Devisor shall enter and have the land and put out the Devisee. And if one devise his land to *I S* for life, on condition to pay 20 l. to *I D*, and after to *I D* in Tail ; in this case, if *I S* do not pay the 20 l. it seems the heir shall enter and hold the land during the life of *I S*, and that *I D* shall not have it till then.

Dier 33.
348. 126.
Co. super
Lit. 236.
See condition.

Dier 33.
348. 126.
1264.

And in cases of Devises of goods or chattels, other words will make a devise conditional in divers cases, as [when] as, I give to *I S* 10 l. when he shall be married ; and [whiles] as, I give to *I S* 20 l. whiles he shall abide with my children, which is as much as if he abide with my children, and [which] as, I give him 20 l. which shall marry my daughter ; and the ablative Case absolute

Swin. 136.

absolute

solute; as, my son being dead, I give to I S & b l. And of all these conditions regularly, the Executor and no other shall take advantage. But if the condition be such, for the matter and substance of it, as is impossible, unlawful, or the like; there perhaps these words may not make a condition, nor the thing devised conditional, but rather make the whole sentence void. Whereof read *Swimb. part. 4. Sect. 5.*

(If one devise his land to his daughter and heir apparent in Fee-simple, this Devise is void; yet if in this case, the wife of the Devisor be privily with child of a son which is born after his death, now is the devise become good; for now she is not heir to her father.)

If a woman that hath a husband, devise her land by will during the Coverture; and after her husband's death when she is sole, she do publish and approve it, in this case and by this means, the devise is become good: but if she make and publish it during the Coverture, and after her husband die and she become sole, this accident without any more, will not make the devise good; the same Law is of the devise of goods and chattels.

If an Infant within age devise his lands or goods and publish his Will, and after he comes to be of full age, he doth publish and approve it again; in this case and by this means, the devise is become good: but if the infant live to be of full age, and do not publish and approve it, *contra.*

If a Legacy of goods or chattels be given on condition to a man incapable, and before the condition is extant, he doth become capable; in this case and by this means, the devise is become good. See before, at Num. 6. more of this matter.

A devise that hath a good beginning, is sometimes avoided and overthrown by subsequent matter in the same Will, and sometimes by subsequent matter in another Will, and sometimes by some other accident *ex post facto*: For if man make a subsequent or latter devise, either in the same or in another Will, so contrary and repugnant to the former, that both cannot stand together, this doth overthrow the former; and therefore, if a man do give White-acre to I S in Fee, or his white horse to I S, and after by the same or another Will, doth give White-acre to I D in Fee, or his white horse to I D, these latter devises do overthrow the former, *cum*

id est *quod* *posterior* *repugnat* *anteriori* *in* *testamento* *ultimum* *vatum* *est*: And a latter Will doth overthrow the former, so the latter part of a Will doth overthrow the former part of the same Will: But if the Devises be such as they may stand both together: and are not directly repugnant, nor do fight one against another, there the later shall not overthrow the former, but both shall be received: And therefore, if one devise his land to I S, and his heirs, and

11. Where a Devise void or voidable in his exception, may become good by matter *ex post facto*, or not

12. Where a Devise good in his inception, shall or may become void by matter *ex post facto*, or not.

By a subsequent repugnant Will.

after by the same Will devise a Rent out of the same land to *JD* and his heirs, or *contra*. So if one devise White acre to *A* for life, and afterwards give the same acre to *B* in Fee; in this case the one may have it for his life, and the other may have the Fee-simple afterwards.

By a waving
of the estate
devise.

If one devise his land to his son and heir in Fee-simple; or devise it to a stranger for years, the remainder to his son and heir in Fee-simple; and the heir after the death of the Devisor doth (as he may) wave the estate given him by the devise, and claim the land by descent, in this case and by this means the devise is become void. But if the devise be to the son and heir in Tail, the remainder to a stranger, there he cannot wave the devise and take it in any other manner. And so if a man have only two daughters, (who are his heirs) and he devise his land to them; or have Gavelkind land, and devise it to all his sons: they may not wave these Devises and take by descent, for by devise they shall take as Joynt-tenants, who otherwise by descent shall take as Pareeners.

If one devise his land to another in Fee-simple, Fee-tail, for life, or years, and the Devisee after the death of the Testator doth refuse and wave the estate devised to him; in this case and by this means the devise is become void. And it seems a verbal waver is sufficient in this case. So if one give goods or chattels to another, and the Devisee refuse it; by this means the devise is become void, and any waver or refusal will suffice in this case; for a man shall not be compelled *Natus velens* to take a thing devised to him.

If a woman sole devise her lands or goods by Will, and after take a husband and die, during the Coverture, by this means the devise is become void. And yet if she survive her husband, and die unmarried, now is the devise become good again.

If one devise his land to *JS* and his heirs, and afterwards *I* die living the Testator; by this means the devise is become void. And in this case no verbal declaration of the Testator, that the heirs of *JS* shall have it, will help; for albeit a devise of land in writing may be revoked by a verbal subsequent declaration, or by any act crossing or controlling that devise, yet a devise becoming void by that means cannot be made good by any such verbal declaration subsequent to the same Countermand. So if one give any goods or chattels to *JS*, and he die before the Testator, in this case and by this means the devise is become void, and the Executor of *JS* shall not have it. And yet if a devise be of land to *A* for life, the remainder to *B* in Tail, and *A* die before the Testator, it seems the devise of the remainder doth continue good notwithstanding.

And if one devise land or goods to the wife of *JS*, and afterwards her husband dyeth, and she marry with another man, and then

Plow. 546.
Perk. Sect.
569. Lit.
Broo. 453.
Kitchen
127. Dyer
317. 350

Lit. Broo.
Sect. 482.
Perk. Sect.
569. Dyer
61 Co. 9.
140. Plow.
543. 544.

Plow. 342.

Plow. 601.
346. 344.

See infra at
Numb. 14.

Perk. Sect.
567. 568.

Plow. 344.

372ed 22

the

the Devisee die, this is a good Devise notwithstanding, and not a void by either of them.

Of one Devise & Term that he hath to a forlife, the remainder to such persons as shall be appointed of Whomever the death of A, this Devise, which in his beginning it be good, yet if the Devisee die before A, the Term how to become void, for he shall take by way of Executory Devise, and take as an immediate purchaser, and be capable and known as the time of the death of the Testator.

If I give to T S 100. If he marry my daughter, and she dye before he marry her, in this case and by this means the Legacy is become void.

If I give a Debt owing to me to T S, and afterwards I release or release the Debt, hereby the devise is become void.

If a man make a Will and give Legacies, and appoint one or more his Executor or Executors, and he, or they after his death all refuse to take upon them the Administration: yet in this case the Legacies remain good, and are not become void. And in this case the court is to grant the Administration of the goods to him to whom it doth belong, and to annex the Will to the Administration, and then the Administrator is to perform the Will as the Executor ought to do.

It is held also that a Legacy of goods or Chaceles may become void by the injurious dealing of the Legatee against the Testator after the Legacy given: whereof read Swinh. par. 17. lib. 2.

And when the thing devised is dead, or spoiled in some way by this means the Devise is not become void, yet it is void in its effect, and is as if it were void. See more supra at Nub. 150. lib. 2. par. 1.

In all these cases when the disposition of the Legacy is pure, and no time is set for the performing of it, or there is a set time for the doing of it, and the Legatee die before the time: and where the disposition of the Legacy is conditional, and a time set for the doing of it, if the Legatee live till that time, or the condition be performed; in all these cases the Executor or Administrator of the Legatee shall have the Legacy, and the same remedy to recover it that the Legatee himself had. But if the Legatee die before the condition be performed, *non est*: And yet if in that case the Testator's mind shall appear to be that the Executor or Administrator of the Legatee shall have it: or the condition be to be performed by another, and there be no default in the Legatee: or if the disposition be modal: or the Legatee that was at first upon condition, be afterwards repeated without condition, or it be referred to a condition to be afterwards set down, and none is set down: in these cases the Legacy is not lost by the death of the Legatee, but shall go to his Executor or Administrator: as for example, if one devise 20 l. to

23. Where a Legacy shall go to the executor or administrator of the Legatee, doth die, before he doth receive it: And where not.

to be paid within *years* after the death of the Testator, and the Legatee dye before the *4* years expired, in this case the Executor or Administrator, after the *4* years shall recover the Legacy. If one give to *W S* and *L* when he cometh to *years* of age, and he dye before he cometh to the age of *years*, in this case his Executor shall not have the Legacy. But if the Devise be thus, I give to *W S* and *L* and it shall be paid him at his age of *years*, and he dye before he cometh to the age of *years*, in this case his Executor shall recover the Legacy. So if one give to *W S* 20 l. when he shall be married, and he dye before marriage, in this case his Executor shall not have it. But if one devise thus, I give to *W S* 20 l. towards his marriage, and he dye unmarried, in this case the Executor shall have, and recover the Legacy. So if one do give to *W S* 20 l. when the Executor of the Testator shall dye, in this case if *W S* dye before the Executor, the Executor or Administrator of *W S* shall not have the Legacy. If one devise good or Chattels to *W S*, and *W S* dye before the Testator, the Executor or Administrator of *W S* shall not have this Legacy.

Bro. De-
vise 27. 41
Swinh. 390
315. Dyce
39. Benth
313. 354.
Plow. 375.

14. Where an Executor upon a Devise to him hath an Election to have the thing devised as Executor, or as Legatee. And when he shall have it in the one right or in the other, and what he shall make a declaration of his Election.

finch ad 2701
2. 37. 8. 36
Dyer. 177.
369. Peru.
Sect. 574.
571. 575.

When any Chattel real or personal is given to an Executor by a Will, the Executor hath an election given him by the Law to have and take it in the one right or in the other, viz. as Executor, or as Legatee: and by his special entry, or seising of the thing, or some special declaration his election is to be made. And if the Executor do enter generally (as most do) and never make any declaration which way, or by which right he will have it, (as most Executors use to do) he shall be said to have it, and the Law will adjudge it in him as Executor, and not as Legatee. But if by any subsequent words or deeds he shall declare himself to be otherwise, he shall be in as a Legatee *ab initio*. And yet if once he do any such act as is proper to an Executor, this is a disagreement to the Legacy *ab initio*, and after that it seems he cannot take as Legatee but must take as Executor. And if one Executor of many to whom a Term of years of land is devised, occupy the same alone, and the rest intermeddle not with the profits thereof, albeit he make no declaration, it is said this is a good declaration of his election to have it as Legatee. But if a Term of years be given to the wife of *W S*, and *W S* be made Executor, and he enter generally, and after makes his Testament and never speaks of this Term, this is no declaration of his Election to have it as Legatee, neither shall the Term be so deemed in him, but as Executor: But in these cases this must be heeded, that howsoever the Executor hath power to take as Executor or as Legatee, yet he cannot take as Legatee to prejudice Creditors in their Debts, but the same things they so take as a Legacy, if there be not enough besides, shall be said to be Assets in their hands, as to the Creditor for the satisfaction and payment of their debts.

Plow. 519.
534. 540.
Co. 10. 47.
2. 37. 8. 36
Dyer. 177.
369. Peru.
Sect. 574.
571. 575.

If a man devise that after his debts and Legacies paid, his wife shall have all the residue of Goods and Chattels to distribute for his Sarl, &c. and make his wife his Executor; In this case it is hold she hath no Election but she must take as Executor, and cannot take as Legatee.

When a Devise of Goods or Chattels is well made, the Assent of the Executor is necessary to the perfection thereof for until then the Legatee may not have or meddle with the thing devised. And this Assent is designed to be the agreement of an Executor or Administrator that a Legatee shall have the thing bequeathed unto him. And it is either express, as when the Executor or Administrator doth by express words agree to the Devise. Or implied, as when the Executor doth not by words, but by some overt act declare his assent that the Legatee shall have the thing devised unto him.

This agreement of the Executor or Administrator is not needfull in the case of Devise of Land, for it a man be seized of Land in Fee-simple, and devise it to another in Fee-simple, he shall, for term of life, or years, in these cases the Devisee may enter into the Land devised without any leave of the Executor or Administrator; and in truth in these cases the Freehold or Estate is said to be in the Devisee before his entry. And therefore if the Heir enter first the Devisee may enter upon him, and put him out. And in case where Land is devised by the custom of a place if the Heir enter first and keep the Devisee out, the Devisee may have a Writ of *Execr. assens* against him for his relief; and this Writ is incident to that custom. But if a Devisee enter first into the Land devised unto him, and then the Heir of the Devisor enter upon him, then the Devisee may take his remedy at the Common Law as in other cases. And with these things the Ordinary Executor, or Administrator is not to intermeddle. But regularly a Devisee cannot nor may not have or take any chattel real or personal devised to him, without the Agreement or Delivery of the Executor or Administrator. And by this assent if the Devise be good (for otherwise an assent will not make it good) the Devise is perfected, and the Legacy executed. And yet if the Legatee have the thing devised in his own hands, or if there be a special clause in the Will giving him authority to take it himself, or if be a Legacy to good and godly uses, as the thing given be like to perish on the ground being corn or the like, and there be assets besides to pay all the debts, in these cases perhaps the Assent of the Executor or Administrator may not be necessary, but the Legatee may take the thing devised without his agreement. And if a Legacy be given to one of the Executors themselves, he may take it without any assent of his Co-executors, and that before Administration also if he will.

If there be many Executors, the assent of any one of them is sufficient.

15. Assens
Quid.

16 Where an Assent is necessary, as for. And where a man may enter into the lands, or take the goods or chattels devised unto him without the assent or delivery or the Executor. And what shall be said a sufficient Assent to execute a Legacy, or not.

many years of the term as he shall live, and after to another for the rest of the time: in all these cases an assent to the first Devisee is an assent to the second also. And so also it seems is the law of a Chancel personal when the Occupation thereof is first devised to one and then the thing to another. And if one that hath a term of years give it to his wife for her life, the remainder to his son, and make her Executrix: and she enter claiming by force of the Devise, and not as Executrix: in this case this is a good assent to execute the devise to him in remainder.

If one be possessed of a term of years of Land, and he devise it to one of his executors alone for part of the time and the remainder of the time after to a stranger: and that executor alone, albeit he enter generally doth occupy the Land himself, and the other executors do not intermeddle therewith: in this case it seems this is a good assent to execute the Legacy to him in remainder for the rest of the term. And yet if one give goods to one of his executors for life, and after to a stranger for life, and his executor alone get the goods into his own hands and occupy them alone all his life time, it seems this occupation without some assent, will not execute the gift in the second Legatee.

If one possessed of a lease for years, devise it to his executors, and devise a rent out of it to I S, and the executors pay the rent, this is a good assent to the whole Legacy. But if he devise a rent or Common out of it for certain years to I S, and after devise the term to I D: and the executor doth agree that I S shall put in his Cattel, or doth pay the rent to I S (which is a good assent to the Legacy of I S: this is no assent nor execution of the Legacy of I D: and yet perhaps if he devise a rent at first to I D for part of the term, and another rent to I S for the residue of the term afterwards: in this case it seems that an assent to the first is not sufficient to perfect the Devise of the second Legatee. And yet if a person devise the occupation or profits of his Land to I S for ten years of his term, and after devise the land itself to I D for the rest of the term: in this case if the executor assent to the Legacy of I S, this will be a good assent to the execution of the Legacy of I D.

If one possessed of a term devise it to I S for life, the remainder to I W, and make I S his executor, and I S take a lease from I W of all his right to the land: this is an impled assent to the Legacy of I W.

If a man devise the occupation of a book or any other Chancel personal to I S, or that I S shall have the occupation of any such like thing during his life, and that after his death it shall go to I D for ever, and the executor deliver the thing to I S: it seems this is a good execution of the Legacy to the second Devisee. I D. And

therefore after the death of *A* he may seize the goods and hold them according to the Devise.

17. How a Devise may attain the thing devised. And what remedy he shall have to recover it, or damages for it. If Lands or any rent, or other profit to be taken out of lands be devised to a man in Fee simple, Fee tail for life, or years, in a sole cal. *A* the Devisee may enter into and have and take the thing devised without the leave or agreement of the Executor and Administrator: and so he may, whether there be any Executor made or not and whether the Will be proved or not, for the Ordinary and the Executor have nothing to do with these things. And if the Devisee in any such case be disturbed in the having or taking of such things, he may have the same remedy as men have in other cases. And where the land is devised by custom, if the Heir enter before the Devisee, the Devisee may be relieved by a Writ called *Ex gressu Quarela*, but if the Devisee enter first, and then the Heir enter upon him, the Devisee may have his remedy at the Common Law.

If Lands are given thus, I will that my Executors shall sell my Land, and with the money made thereof shall pay 10*l*. to my daughter *A*, and 10*l*. to my daughter *B*, in this case and for this gift *A* and *B* may either sue the Executors in a Court of Equity or have an Action of Account against them in a Court of Common Law.

If Lessee for years devise his term to Executors for life, the remainder over to *JS* for the rest of the term, and the Executor entrench and doth assent to the Legacy and dye, and the Executor of the Executor doth take the profits of the Land, and keep out the second Legatee, in this case it seems he may have an Account against the executor of the executor of the profits of the Land. But if one devise his land to his Son and his Heirs (except 20*l*. a year for seven years to be employed as followeth) and doth appoint his son (being his executor also) to pay that money to his daughters for portions; in this case the daughters may not have an Account at the Common Law, but they may sue the executors in the Spiritual Court or in a Court of Equity and if the executor be dead they may sue his executor.

If one devise a Rent out of his Land, and do charge the Land with a distress the Devisee may make use of that remedy and distrain for the rent: but such power be given him by the Will to distrain, he may not distrain for it.

If one be possessed of a term of years of Land, and devise it to his wife to the end that she with the profits thereof shall breed up his children: in this case this is no Legacy to them, and therefore it seemeth they have no remedy but in Chancery or some other Court of Equity against her, if she refuse to do it.

And in cases of Devises of Goods and Chattels as Leases for years, Rents out of such Leases, and the like, the Legatee cannot take the thing

Prk. 360
576, 577.
578, 579.
C. 111.

Trin. 9. 12.
Lovers
case Dir.
151, 152.

Dir. 177.

Trin. 9. 11.
Lovers
case.

Dyer 348.

Plow 345.

Plow. 340
Perk. 360.
594, 181.
208, 449.
Swind. 115

thing devised before he have the Assent of the Executor or Administrator thereunto: And therefore, if in these cases the Executor or Administrator refuse to agree to, perform, and deliver the Legacy, the Legatee may sue him in the Spiritual Court, or in some Court of Equity to compel him thereunto: but a Legatee may not sue for a Legacy in any of the Courts of Common Law, neither may he sue the Executor or Administrator in the Spiritual Court for the Legacy, until the Will be proved: but he may by suit there compel him to prove the Will, or to refuse the Administration: And in these Courts and by these means, the Devisee may recover his Legacy against an Executor or Administrator, if he have Assets to pay the Debts of the Testator, for otherwise a Legacy is not recoverable at all; but in case where the Executor or Administrator hath once agreed to the Legacy so as it is executed, it is then so vested in the Legatee, and he hath such a property therein, that he may enter into, or seize and take the thing devised as his own, and if any man keep or take it from him, he may have relief as in other cases.

If another doth claim by Deed of gift the goods a Legatee doth sue for: this may be tryed in the Ecclesiastical Court.

If a Debt, Obligation, or any such like thing in action be devised to another, the Devisee hath no means to recover it, but by a Suit in the Spiritual Court, or in some Court of Equity, to compel the Executor to sue for it himself, or to make the Legatee a Letter of Attorney, to sue for it in the Executors name: for the Legatee cannot sue for it in his own name unless he be made executor as to that Debt, &c. (which is the best course in these cases:) and yet if the Legatee have the Bond of Especialty in his hands, he may deliver it up or cancel it.

If a man devise a Term of years of land to T S, and make another his executor, and the executor having enough besides to pay the debts, doth sell this Term, in this case, albeit the sale be good, and T S have no remedy nor means to recover the Term, yet he may sue the Executor for it, and recover the worth of it in damages in a Court of equity.

And now having done with the first part of a Testament, viz. a Devise, we come to that which doth concern the second part, viz. an executor.

Any person that may make a Testament, and devise his goods and chattels, may make an executor. And a woman that hath a husband, as to the goods and chattels she hath as executrix to another, and as to her own goods and things in action, viz. debts due unto her upon Obligations, and especialties made to her alone before, or after her marriage, may make an executor. And he that may make an executor, may make either one, two, three or more his executors at his pleasure. And he may if he will make one man

what person may make or appoint an Executor, and what not and how.

Perk. Sect.
309. d. 10. 11.

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his Executor for one year, another man his Executor for another year, or one man his Executor within such time, and then another his Executor. As one may make A and B his Executors, and that B shall not meddle during the life of A. And a man may make one man Executor for one part of his estate, and another man his Executor for the other part of his estate; or one may make one man Executor as to part of his estate, and give intendment as to the residue of his estate. Also a man may appoint one to be his executor, if he will accept it, and if he refuse that, another man be his executor. And lastly, a man may make another his executor upon condition, viz. so as he give Bond to such and such men to perform his Will, or the like. And all these appointments and appointments of executors are good.

19. What person may be made or appointed an executor, and what not, and by what name.

Husband and wife,

Any person that may be a Legatee, and take by the Devise of goods and Chancels, may be an executor. And therefore it is said That any person or persons, male or female, of the Clergy or Laity, children or strangers, friends or enemies, married or unmarried, Creditor or Debtor, Bond or free, may be an executor. And that a Bastard, an Excommunicate or an Out-lawed person may be as able and as absolute an executor as any other. And an Infant or child *in utero matris* may be an executor; but he cannot meddle with the Administration of the goods untill he be of the age of 17 years; and therefore the Ordinary must grant the Administration unto some other untill that time in trust, and for the benefit of the Infant. And a woman that hath a husband, may be an Executrix to, any other person. Also a woman may be an Executrix to her own husband, and the husband may be executor to his own wife and by this means he may recover all the Debts due to her upon Obligations, Recognizances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage, all which the husband shall not have but by Executorship or an Administration of her goods and chattels. And all these persons that may be executors, may be executors by that name as they may be Devisees: And yet if there be two of one name, and the Testator make one of that name his executor, and doth not say, neither can it be discerned which of them he doth intend; in this case neither of them shall be executor.

But it is said that an Heretick, Apostate, Traytor, Felon, Ruffian, convict, Sodomite, Libeller, Bastard begotten in Incest, or a person whose name cannot be an executor: And that if a man be for any of these causes incapable at the time of the death of the Testator, when the executor is to take upon him the Executorship, that he is for ever incapable. But it hath been held by the Common Law, that a person strait, may be an executor.

See at
Numb. 4.
part. 2.
Numb. 7.
Swinh.
22a. Fitz.
Executors
47. 87. De-
ville 3. Fitz.
Executors,
11. 88.
Non-abili-
ty, 8. Bro.
Non-abili-
ty, 38.
Co. 6. 67.

Fitz. Exe-
cutor 21.
Broo.
Consulta-
tion 55.
See before
at Numb.
7. Swinh.
193.

Swinh.
22. 229.
Co. 3. 30.
See before
at Numb.
7. Fitz. Exe-
cutor 19.
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Swin. part:
4 Sect. 17.
58. 19.
Dyer 4.
21. H. 3. 8.
19 H. 6. 6.
Fitz. Exec.
cutor 43.
Brook. Exec.
utors. 98.
74. Fitz.
Executors.
113. 121.
Brief 599.

The most apt and proper words whereby to constitute an Executor, are, I make *I S* my Executor, or, I make *I S* the Executor of my Will, &c. But an Executor may be constituted by other words equivalent or by implication: And therefore, if a man say in his Will, I will that *I S* shall be my General Administrator, or I will that *I S* shall administer all my goods, or I will that *I S* shall dispose all my goods and chattels, or I commit all my goods to *I S*, or I commit all my goods to the disposition of *I S*, or I make *I S* Lord of all my goods, or I make *I S* Legatary of all my goods, or I leave all my goods to *I S*, or I give all my goods to *I S*, and make no other Executor; in all these cases, *I S* by intendment of Law is made Executor of all the goods and chattels of the deceased: So if a man say, Of all my goods I make *I S*, and say no more but omit the word [Executor,] by these words *I S* is made Executor: So if one say, I will that *I S* shall dispose all the goods that are in his hands, by these words *I S*, as to those goods is made Executor: So if I deliver goods to *I S* to keep untill my death, and then to distribute *ad pios usus*, or for my soul, hereby *I S* is made Executor of those goods. So if one say, I will that *I S* shall be my Executor if I D will not; by this I D is made Executor in the first place by implication, and if he refuse, then *I S* shall be Executor. But if a man make A and B his Executors, and say, I will that *I S* shall be a Co-adjutor, or helper to A and B *ad distribuendum* or *ad administrandum bona mea*; or I will that *I S* shall be Surveyor, or Supravisor of my will; in these cases, and by these words, *I S* is not made Executor with A and B. And yet if he say, I will that *I S* shall have Administration of my goods, or be Executor with A and B, or be Administrator with A and B, in these cases and by these words, *I S* is made joynt Executor with A and B. And if one supposing *I S* to be dead, say, I will that I D shall be my Executor because *I S* is dead; in this case and by these words *I S* if he be living is made Executor first; and if he refuse, I D shall be Executor: If one make A B and C his Executors, and then saith afterwards, And I will that B shall Administer my goods alone; or that B onely shall Administer my goods; it seems in these cases, B onely is made Executor and that A and C are not made joynt Executors with him.

20. By what words wa man may be made an Executor, and what words in a Testament shall make a man full executor, or nor, but a co-adjutor or supravisor; and who shall be an executor by such words.

Co. 9. 39.
Plow. 276.
Doct. &
Stud. 98.
132. Dyer
336. 4 H. 7.
22.

In all cases where a man hath any goods or chattels to administer, and he doth die a natural or civil death, and dyeth intestate, either indeed, or doth make no Will at all, or appoint any Executor, or in Law, or that doth make one or more his Executor or Executors, and he or they so appointed, is, or are such persons, as are not in being, or if they be in being, is or are so incertainly named, that it cannot be discerned whom the Testator doth intend, or if he is, or they be well named, he is, or they are all incapable by

21. Where and in what case an Administration is grantable, or not: And to whom it doth belong to grant it, and to whom it must be granted.

reason

reason of some legal impediment, or if otherwise they be capable, they do all dye before the Will be proved; or if they live, if being cited to come in before the Ordinary to prove the Will, they either refuse to appear, or if they do appear, they refuse to prove the Will, and to take upon them the Administration of the goods and chattels of the deceased; in all these cases, the Ordinary may and ought to grant the Administration of all the goods and chattels of the deceased to him that of right it doth belong unto, according to his discretion: And if a man make a Will after the death of the Testator, the Executor prove it, and then dye intestate, the Ordinary must grant the Administration of the goods of the first Testator, not administered in the hands of the Executor to some competent person or persons according to his discretion: but where a man hath no goods and chattels to administer, either he hath none, or if he have, they are none of his, or if they are, there is an Executor named, *in verum naturam*, capable, and well named, and he doth accept, or at least hath not refused the Executorship, in these cases, the Administration ought not to be granted; or if it be granted, it will be void or voidable at the least: And where an Administration is grantable, it is to be granted by, and had from the Ordinary of the Diocese, where the party, whose goods are to be administered, lived at the time of his death, for regularly he that shall have the Probate of a Will, in case where a man doth make a Will, shall have the granting of the Administration of his goods and chattels, in case he die intestate: And therefore, if all the goods and chattels of the party deceased, be within the same Diocese wherein the intestate lived and dyed, the Ordinary of that Diocese, or his lawful Deputy, or Commissary, or the Arch-deacon of the Diocese, or his Deputy or Officiall (as the Custom of the Countrey is) or the Dean and Chapter in time of vacation of the Bishop, shall grant the Administration, and the Administration shall be had from him: but if *Bona notabilia*, there be *bona notabilia* in the case, *viz.* if the party deceased have goods or chattels of the value of five pounds or upwards, lying and being at the time of his decease in divers Diocesses; in this case, the Archbishop or Metropolitan of the Diocese wherein the party dyed, or *Sede vacante*, the Dean and Chapter being Guardian of the Spiritualties, and not the Ordinary of the particular Diocese shall grant the Administration; and it must be had from him: for if the Ordinary of the particular Diocese grant it when it ought to be granted by the Metropolitan, the Administration is void, not only as to the goods that lie within the other Diocesses, but also as to the goods lying within the same Diocese: And so is it also, if it be granted by the Ordinary of another particular Diocese, as if A die within the Diocese of Lincoln, the King being indebted to him at the time of his death, and the Administration of his goods and chattels

Stat. 31
Ed. 3. cha
11. 23 M.
8 c. 5. Fitz
Administra-
tion, 7. Litt.
Bro. Sec. 2.
296.
See infra
Numb.

Co. 5. 29.
30 Dyer
305. F. N.
8. 130.
Plow. 377.
281. Co. 2.
18. 19.
Dyer 339.
8 c. 11. infra
at Numb.

chattels is granted by the Bishop of *London*; this Administration is void: And if the Metropolitan do grant an Administration, when it ought to be granted by the Ordinary of the particular Diocess, the Administration is voidable by sentence of the same Court out of which it is granted: If one die in *Ireland*, and have nothing but an Especialty for money, and that Especialty doth lie in *England*, the Ordinary of the Diocess within which that place is where the Especialty doth lie, shall commit the Administration; and if the Ordinary of another Diocess grant it, the Administration is void: And therefore the case was, A Merchant in *Ireland* was bound in an Obligation of 40*l.* to one *JS* in *London*, and the Obligation was made in *Ireland*, but remained always in *London*, and the Merchant dyed intestate in the County of *Bedford* in *England*, and a Bishop of *Ireland* did commit the Administrator to one, and the Archbishop of *Canterbury* did commit it to the wife of the Intestate who had the Obligation; in this case the last Administration was adjudged good: And it was there held, that the Administration shall be granted by the Ordinary of the place, where the Especialty doth lie at the time of the death of the Intestate, and not by the Ordinary of the place where the debt began. And in cases, where the Administration is grantable by the Ordinary and others as before, such persons having power to grant it, may not grant it to whom they please, but as they are bound to grant it, and cannot refuse so to do, so are they directed and appointed to whom they shall grant it: For it is appointed by a special Law, That the Ordinary shall depute the next friends of the Intestate to administer his goods if they desire it: and the Administration is to be committed to the widow, or next of blood, or both to the Intestate, and where there be divers in equal degree, and they all sue for it, the Ordinary may accept them all, or refuse some of them, and commit the Administration to the rest onely; and if some of them onely sue for it, he may grant it to them alone: So that now the Law and course is to grant the Administration to the nearest of kin to the deceased: As 1. to the husband or wife; and if there be none such, 2. to the childrtn sons or daughters; and if there be none such, 3. to the Parents, Father or Mother; and if there be none such, 4. to the brothers or sisters of the whole blood; and if there be none such, 5. to the brothers or sisters of the half blood; and if there be none such, 6. to the next of kin, Uncles, &c. And if these come in time and desire the Administration, the Ordinary may and must grant it to them, and cannot grant it to any other if they be capable of it, as most men are: and if divers of these in equal degree desire it, the Ordinary may grant to which of them he pleaseth, howsoever in this case, it seems most just and equal to grant it to them all, unless he have some special

Dyer 305.

Stat. 31.

E. 1. c. 11.

21 H. 8. c.

5. Lit. Br.

Sed. 233.

415. Fitz.

Excommen-

ment. 131

Co. 9. 39.

40. 3. 40.

Dyer 139.

4 H. 7. 14.

special reason to admit some and to exclude the rest: and if none of these that are next of kin shall desire it; but suffer the time to slip, in this case, the Ordinary may grant it to whatsoever stranger he please. And yet then perhaps the next of kin may by suit get the same Administration revoked, and a new Administration granted to him. See *infra* at Numb. 41.

22. How an Administration may be granted, and what shall be said a good Administration, or not.

An Administration may and must be granted in writing under Seal, for by word of mouth it may not be granted; and it may be granted as well upon condition as absolute: and it may be granted as well for a part of the estate as for the whole: And therefore, if a man have goods in two Provinces, and he make a Will of his goods in one of the Provinces, and die Intestate for the goods in the other Province, an Administration may be granted for the goods in this Province: Also an Administration may be granted during, or until a certain time, or continually. And therefore, if a man make a Will and appoint an Executor for seven years, after the seven years ended, the Ordinary may and must grant an Administration of the goods. So if one do appoint another to be his Executor, to be his Executor a year after his death, the Ordinary may and must grant the Administration for that year, until the power of the Executor doth take place; And all these Administrations are good.

Dyer 291.
Fitz. Ad.
min. 5. 24
H. 6. 14.
Plow. 279.

23. Who shall administer after the death of an Executor, or Administrator, and who not, and how an Executor of an Executor shall charge and be charged.

If an Executor die after he hath proved the Will, and he hath made a Testament, and appointed an Executor therein; in this case, this Executor also shall be Executor to the first Testator, as he is to the second, and he shall have all the benefit and be subject to all the charge that the first Executor had and was subject unto; and yet the goods of one Testator shall not be subject to the debts of the other; but each of the Testators goods shall be subject to the payment of his own debts onely, And if in this case, the Executor of the Executor take upon him the Administration of the goods of the first Testator, he cannot refuse the Administration of the goods of the latter: but he may take upon him the latter and refuse the former. But if the Executor refuse to administer to the first Testator before the Ordinary, or die before the Probate of the Will, and he hath made a Testament and appointed an Executor therein; in these cases it seems the Executor of the Executor shall not administer the goods of the first Testator, but the Ordinary must grant the Administration thereof: And yet if all the residue of the goods of the first Testator be given by the Testament to the first Executor after the debts be paid; in this case, albeit he die before Probate of the Will, yet his Executor shall be Executor also to the first Testator, or else he shall have the Administration of his goods and chattels granted unto him: And therefore if A make his Will, and give Legacies to B and D, and give all the rest of his goods and

Stat. 25.
Ed. 3. c. 4.
Go. 5. 9.
Plow. 286.
34 H. 6. 14.

Trin. 29.
Jac. Co. 8.
Wolf and
Heidens
case.
Dyer 374.

Adjudged
in Hill. 9.
Car. in Den.
case.

chattels

chattels after Debts and Legacies paid to *C* his wife, and make her his sole Executrix, and she die before Probate of the Will, or any election made, not knowing of the Will, and *E* sue out an Administration of the goods of *A*, and pay the Legacies to *B* and *D*, and *F* sue out an administration of the goods of *C*; in this case, the Administrator of *C* and not of *A* shall have the goods; for the Law doth judge them in *C* after the Debts and Legacies paid without any election.

Bro. Executor 117.
26 H. 8. 7.
Co. 1. 56.
Dier 371.
Terms of
the Law
tit. Administration.

Fitz. administration.

If an Executor after he hath proved the Testators Will, die Intestate; in this case, the administration of the goods of the first Testator not administered in the hands of the Executor must be granted to whom the Ordinary shall think fit: And if the Ordinary please, he may grant the Administration, *de bonis non administratis* of the first deceased, and of the goods of the second deceased to one and the same person: And herein the Administrator must take care that his administration have special words for the granting of an administration of the goods of the first Testator, not administered; for howsoever some hold that by the general administration, the Administrator shall have not onely the goods of the Executor, but the goods of his Testator also, yet it seems this is not taken to be Law at this day.

Dier 160.

If there be two executors made, and one of them doth refuse before the Ordinary, and the other doth prove the Will, and make a Will himself and appoint an executor and then die; in this case it seems the executor of the executor that did prove the Will alone shall have the disposition of all the estate, and be executor to the first Testator, and that the surviving executor shall not meddle therewith, for that his election by the death of his companion is gone. And if one make two executors, and one of them doth make an executor and dye, and the other that doth survive hath accepted the executorship; in this case, the surviving executor shall have the sole disposing of the estate, and the executor of the deceased executor shall not intermeddle therewith: And if therefore the surviving Executor dye Intestate, an Administration *de bonis non Administratis* of the first Testator shall be granted: And if the executor of the deceased executor have any of the estate in his hands, the surviving executor may take or recover it from him: And if two be made executors, and one of them is incapable; in this case, he that is capable shall administer alone.

Lit. Bro.
Señ. 179.
Bro. Exec.
149. 99.
Fitz. Exec.
12. 113.
Dier 187.

Dier 172.
112.
Co. 5. 9.

If one that is Administrator of another mans goods do make his Will, and make an executor and die; or do dye Intestate, and the Administration of his goods granted to some body, in the first of these cases the executor, and in the last the Administrator, unless he be made Administrator of these goods also, shall not

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meddle

meddle with these goods of the first deceased : but the administration of the goods of the first deceased in the hands of the Administrator not administered, must be granted again. And hence it is that if the Administrator of my goods have a judgement for a debt due to me, and he die before execution, and make an Executor, or die intestate, that in this case his Executor or Administrator shall never have execution of this judgement. And the same law is of the Administrator of my Executor in this case.

24. Where an Executor or Administrator may accept or refuse the Executorship or Administration, and how. And where he may be Executor after he hath refused or not. And what act or intermeddling with the goods of the dead shall be said an Administration, and what not.

An Executor or Administrator may accept or refuse the Executorship or the Administration at his pleasure ; and therefore he may at any time before he hath intermeddled with the estate as Executor or Administrator refuse it ; and if he be sued by any as Executor or Administrator, he may plead, *ne unquies Executor*, i.e. he was never Executor or Administrator, and did never administer : and if it be true, he shall by this means avoid the suit ; for a man shall not be compelled to take such a charge upon him whether he will or no. If therefore there be many Executors, or an Administration be granted unto many : and one of the Executors prove the Will in the name of the test, or one accept the Administration in the name of all the rest, yet the rest may refuse to accept it, and plead in any Suit against them that they are not Executors or Administrators. But as an Executor or an Administrator after he hath once legally refused the Executorship or Administration can never after intermeddle therewith : so after he hath once legally accepted thereof (that is) hath done any thing as Executor or Administrator, and which is proper onely for an Executor or Administrator to do, he can never after refuse it. And his acceptance of part, in this case, will make him chargeable with all, except it be in the case before of an Executor, who may accept of the last Executorship, and refuse the first.

If the Executors being cited to come in and prove their Will, appear before the Ordinary and refuse to administer and to prove the Will, they cannot afterwards accept it or intermeddle with it. But herein this difference must be observed ; That where there be many Executors named and made, and they being cited, some of them onely do appear and refuse to accept : (the rest of the executors being then living) and after some or one of the rest of the executors prove the Will or take upon him the executorship ; in this case and notwithstanding this refusal, they that do refuse may afterwards at any time, at least during the life time of their Co executors that did accept it, accept thereof, and intermeddle therewith, as far forth as either of the rest. And therefore in this case, howsoever the executors refusing, shall not be charged in any suit against all the executors for any thing due from the Testator, but they may by their plea avoid it : yet the executors accepting cannot sue for any thing

Co. 9. 37.
37 H. 6. 27.
28.
20 H. 6. 3.

Co. 9. 37.
Fitz adm.
6. 11.
Bro. adm.
nisi. 32.
Executors
117.
Co. 5. 28.
Perk. sect.
415.
Dier 160.
21 Ed. 23.

thing due to the Testator, nor be sued for any thing due from the Testator, but they must sue and be sued in the names of themselves and their Co. executors that do refuse also. And if there be three Executors, and two of them prove the Will, and the third refuse; yet this third Executor alone may release any debt due to the Testator. But if there be but one Executor made, and he alone, or if there be many made, and they do altogether refuse before the Ordinary to take upon him or them the Administration; in this case the Testator is so far forth said to be dead intestate, and thereupon therefore the Ordinary may grant the Administration of the goods of the deceased, and then the Executor or Executors can never after accept thereof, or intermeddle therewith. And if one or more of the Executors refuse, and the rest accept, if he or they which accept die before he or they that refused accept; it seems in this case they can never afterwards accept it, but the Administration must be granted.

If one be sued as Executor or Administrator, and he plead to the Suit *ne inquis Executor*, i. e. he was never Executor or Administrator, if he have not in truth intermeddled before; this Plea is a refusal of the Executorship or Administration, and therefore he can never afterwards accept or intermeddle with the Executorship or Administration.

Every intermeddling with the goods of the deceased, or with the office and work of an Executor, shall not be said to be such an Administration, as to amount unto an acceptance of the Executorship or Administration, and so to make a man chargeable as Executor or Administrator. And therefore if a man that is an Executor or Administrator do only lay up and preserve the goods of the deceased; or command another to take away the goods of the deceased from one that hath them in his keeping; or see the deceased buried in a decent manner, and for that purpose use, and if need be, sell some of his goods to do it; or make an Inventory of the goods and chattels of the deceased; or prove the Testators Will with his own money; or take his own goods lying amongst the goods of the deceased: or take and use some of the goods of the deceased onely by mistake or as a trespassor, or by the delivery of another; or take and dispose any of the goods of the deceased, when the Executor or Administrator doth challenge them as his own and in his own right: or if he redeem any of the goods of the deceased with his own money when they are pledged to the full value, and the day of redemption is past, as neither of these acts will make a stranger an Executor of his own wrong; so neither will they amount to an acceptance of the Executorship, and make the Executor or Administrator chargeable as Executor or Administrator. But if a man that is an Executor or Administrator shall sue by that name for any debt due to the deceased; or being su-

Executor of]
his own]
wrong.]

See the
cases be-
fore.

Co. 2. 37.
5. 34.
Dier 105.
Kelw. 63.
B. o.

Administ.
35. 36.
Admin. 7.
Bro. Exc.
cutor 16.
32 H. 6. 6.
Dier 235.

ed by that name for any debt or duty due from the deceased, shall im-
part to the Suit, or plead any other plea besides *exequatur* or shall take into his hands the goods of the deceased, and
convert them to his own use, and alter the property by sale, gift,
or otherwise, and all this as the goods of the deceased; (and so it
shall be intended against him if he do not declare the contrary, that
he doth take and use them as his own &c.) or if he deliver the goods
of the deceased to Creditors or Legataries in satisfaction of their
Debts or Legacies; or receive any Debt due to the deceased, and
give a release for the same, or release any Debt due to him before it
be paid, or pay any debt due from the deceased, except it be with his
own money: any or either of these acts will amount unto an ac-
ceptance of the executorship; and therefore after an executor or
Administrator hath done any such act, he can never after refuse the
executorship or administration.

If a woman sole be made an Executrix to another, and she marry
a husband before she intermeddle with the estate, and then her hus-
band doth administer, this is such an acceptance as will binde her,
and she can never afterwards refuse it.

23. What
things an Ex-
ecutor or Ad-
ministrator
shall have by
verue of his
executorship
or administra-
tion, And
what not.
First in respect
of the nature
of the thing.

The Executor or Administrator shall have by vertue of his Exe-
cutorship or Administration all the chattels real and personal of the
Testator, as well those that are in possession, as Leases for years of
Land, Rent, Common or the like, Grants of next Advowsons, and
Presentations, Wardships of Heirs by reason of Tenure: *in capite*, or
Knights Service, corn growing and cut, trees, and grasse cut and se-
vered, Cattel, Money, Plate, Householdstuff and the like, as also
those that are in Action, as right and interest of Executions upon
Judgements, Statutes, Obligations, Causes of action, and the like;
He shall have also all other things that are of the nature of Chattels.

And therefore the Executor or Administrator shall have the two
years of the Heir female that is in Ward; a releif or an Advow-
son that is fallen; and yet if a Bishop have title to present by the
vacation of a Church, and then he die, in this case the King, and
not the Executor or Administrator of the Bishop shall present. And
if the Lord have a greater estate in the Seignory then for life or
years, it is said the Executor or Administrator shall not have the re-
leif. And the Executor or Administrator of the Lord shall have
Fines assessed upon the Tenants upon their admittances in the Lords
time. And if I make a Feoffment in Fee, gift in Tail, or Lease
for life, rendring Rent, and the Rent is behinde, and then I die; in
this case the arrearages of Rent due to me in my life time shall go
to my Executor or Administrator in the nature of a Chattel. So
if a Rent be granted out of Land to me in Fee-simple, Fee-tail,
for life, or years, and it be not paid to me in my life time, these
arrearages shall go to my Executor or Administrator, and not to any
other.

Bro. Exe-
cutor 147.

Co. Super
Lit. 209.
388.
Perk. sed. 60.
Flow. 253.
Doct. 850.
39. 76.
Perk. Sed. 833.
Co. 4. 65. 63. 7. 17.
Kelw. 118.

Co Super
Lit. 79.
Dier 140.
232.
Dier 24.
Bro. Exe-
cutor 145.

Stat. 34 H.
8. c. 37.
Co. 4. 48.
Dier 575.

F. N. B.
110. L.

Dier 275.

Co. 4. 64

Dier 283.
34 H. 6 27.

See sup.
at num. 7.

B. o. chat-
tels 12.

Plow. 292.
Co. 2. 39.

9. 99.

Kelw. 210.
See before
at num. 7.

Co. 10. 87.
Lit. Sect.
740.
Fitz. Ac-
count 56.
F. N. B. 110.

other. And so also if a Parson have an annuity in Fee in the right of his Church, and it be behinde. and the Parson dye, in this case the Executor or Administrator, not the Successor of the Parson shall have the arrearage. And if I be seised of land and possessed of a stock of cattel, and let it to another for years, and he covenant by the Lease to pay me and my Wife, our Heirs and Assigns 100 l by the year, during the term; in this case after my death, and my wives surviving me, her Executor or Administrator and not my Heir shall have this payment. And if one seised of Land in Fee make a Feoffment of it to me excepting the trees, and after grant me the trees for years; or if he make me a Lease of the land first for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the Land; in both these cases I have the trees in the nature of a Chattel, and if I dye my Executor or Administrator shall have them. And if a man grant to me the next Presentation to the Church of D; in this case if I die, my Executor or Administrator shall have it as a Chattel. And my Wife shall have so much of her wearing Apparel as is necessary and convenient for one in her estate and condition: and therefore that shall not go to my Executor. But so much of her wearing apparel as the hath superfluous and more then necessary for her, shall go to my Executor or Administrator after my death. And the Charters and Evidences that do concern any of my Chattels which my Executor or Administrator is to have, shall go with the same Chattels. So also any Charters whatsoever if they be pledged to me for money, shall go to my Executor or Administrator until the money be paid. But otherwise those Deeds and Evidences that do belong to the Heir as incident to the inheritance, shall not go to my Executor or Administrator after my death. But matters of trust and such things as are personal, as Offices of trust, wardships by reason of a Tenure in Socage, or *jure natura*, or the like, shall not go to the Executor or Administrator after the death of him that hath them. So an Executor or Administrator shall not have the grafs and trees growing on the ground, no more then the soil or ground it self whereon they grow. So an Executor or Administrator shall not have the incidents of a house, as glass, doors, wainscot, and the like, no more then the House it self, nor Pales, Walls, Staulks, Fish in Ponds; Deer, or Coneyes in Parks; Pigeons in Pigeon houses, or the like.

If a Lease for years of Land be granted to me and my Heirs, or to me and my Successors, and I die; my Executor or Administrator and not my Heir shall have this term. The same Law is, if a wardship, or the next Advowson of a Church be granted unto me and my Heirs, or if a Covenant or an Obligation be made to me and my Heirs: for in all these cases this is still a Chattel in

Secondly, in respect of the case.

me that shall go to my Executor or Administrator, and he onely shall take advantage by it. And if my Heir or Successor happen to get the Deed, the Executor or Administrator may recover it from him. And if a Lease be made to me for twenty years without naming my Executors, or Administrators, or Assigns in the Lease; in this case if I die, my Executor or Administrator notwithstanding shall have it during the term. And if a Lease for years be made to a Bishop and his Successors, and he die; his Executor or Administrator, nor his Successor shall have it. And if a man be possessed of a term of years of Land, and grant it by Deed, or give it by Will, to me and my Heirs, or to me and my Heirs males: or devise it by Will to A for life, the remainder to me and my Heirs; in these cases I shall have these terms of years as Chattels, and after my death my Executor or Administrator shall have them. And if a man grant a rent out of his Land to me and my Heirs for twenty years, and I die, my Executor or Administrator not my Heir shall have this rent. And if a rent be granted to me, my Heirs and Executors during the life of I. S. and for one half year after, and I die, in this case the half years Rent shall go to my Executor or Administrator, and not to my Heir. And if I be seised of Land in Fee, and make a Lease for years of it, rendering rent, and then devise this rent to a stranger, and the Devisee die; in this case his Executor or Administrator shall have it. And if the Lessee for life make a Lease for years absolutely, this in Law is a Lease for so many years if the life so long live, and shall go to the Executor or Administrator after his death.

If I have a Box, Chest, or Trunk wherein my writings that do concern my inheritance do lie, and the same is open and not sealed or locked, in this case my Executor shall have it; but if it be locked or sealed, *contra*. For then it shall go to him, that is to have the writings as incident thereunto. And yet if there be any money, plate, or any other such like thing in the Chest also; my Executor shall have that thing.

The incident of a House, as Glass-windows annexed with nails or otherwise to the windows, the Wainscot fixed by nails, screws, or irons put through the posts or walls, Tables dormant, Furnaces of lead and brass, and Fats in a Brew and Dye-house standing and fastned to the walls, or standing in or fastned to the ground in the middle of the house (though fastned to no wall) a Copper, or Lead fixed to the house, the Doors within and without that are hanging and serving to any part of the house, shall not go to the Executor or Administrator to be divided and sold, from the house, albeit the Executor or Administrator have a Lease for years of the house, and by that means hath the House also. But if the Glass be from the windows, or there be Wainscot loose, or doors more

New terms
of the Law
sit assign.
Co. super
Lit. 46.

Co. 8. 95.
10. 87.
Plow. 544
Lit. Sect.
740.

M. 7 Jac.
Co. F.
Watts case.
Lit. Sect.
739.

Dier 51

Co. 7. 12.

8. 0. Exe-
cutors
145. 97.
Fitz. Exe-
cutor 1131.

Co. 4. 63.
21 H. 7. 26

then.

then are used that are not hanging, or the like : these things shall go to the Executor or Administrator.

Co. 5. 36.
Pitz. Exec-
utors 8.

If I make a Feoffment to *JS* of Land, on condition that if he pay me, my Heirs or Assigns, or my Heirs, Executors or Administrators a hundred pound such a day, that the Feoffment shall be void, and I dye before the time of payment; in this case, if this money be paid at the day, my Executor or Administrator, and not my Heir shall have it.

Co. 4. 63.
11. 48.

If one be seised in Fee of Lands whereon there are trees growing, and he make a Feoffment of the Land to me, excepting the trees, and afterwards he doth sell me the trees for ever, and after I die; in this case my Executor or Administrator shall not have these trees as they shall in case where the Feoffor doth grant them to me for years. And if I be seised of Land in Fee, and I make a Lease for life, or years of it, excepting the trees, and afterwards I die; in this case my Executor or Administrator shall not have these trees, but they shall go in both cases with the land.

Co. 4. 63.
11. 48, 84.

If a Lease be made for life or years, of land, whereon a house is standing, or timber is growing, and the house is prostrate, or the timber is cut or fallen down (by whomsoever, or what means soever it be) the materials of this house, and this timber is now become a Chattel; and therefore if the Lease be without impeachment of waste, it shall go to the Lessee, and after his death to his Executor or Administrator, but if the Lease be otherwise, it shall go to the Lessor, and after his death to his Executor or Administrator. But if the timber be cut for reparations onely; or the Lessee will employ the materials of the house to build it again, and the Lease do continue, it may be so employed; and then the Executor or Administrator of the Lessor may not take it.

Co. 11. 50.
Perk. Sect.
58.

If one be seised in Fee-simple of ground whereon trees do grow, and he sell me these trees for money, and afterwards I die before they be cut, in this case my Executor or Administrator shall have and may cut them.

Co. super
Lin 388.

If the Kings Tenant by Knights service *in Capite* be seised of a Manor whereunto an Advowson is appendant, and the Church become void, and the Tenant dieth, his Heir within age: in this case the King and not the Executor or Administrator of the Tenant shall have the Presentation. And yet if in this case the Land be held of a common person, the Executor or Administrator and not the Guardian shall have it.

Dier 316.
Doct. & St.
35.
Perk. Sect.
39.

In all cases regularly where a man doth sow Land, whereof and wherein he hath such an estate as may perhaps continue until the corn be ripe, if he that doth sow it die before it be cut and severed, his Executor or Administrator shall have it; as if the Husband sow the land whereof he hath an estate in Fee-simple, Fee-tail, for life

or for a certain number of years in the right of his Wife; and dye ere it be ripe; in this case the Executor or Administrator of Husband and not the Wife shall have it. And if one that holdeth land for the life of *I S*, sow the land, and *I S* dye ere it be ripe and cut, the Executor or Administrator of the Tenant shall have this corn. And if Tenant in Tail, or in Dower sowe the Land they do so hold, and dye ere it be cut; the Executor or Administrator, not the issue Tail, nor the Heir, or him in Reversion shall have it. So if the Husband make a Feoffment in Fee to the use of himself for life, and after of his wife, &c. and he sow the Land, and after die; his Executor or Administrator, not his Wife shall have the corn. But if a Feoffment be made to the use of the husband and wife together in Fee, or for life, and the Husband sow the land, in this case the wife, not the Executor or Administrator of the Husband shall have the corn. So if a Lessee for years certain sow the Land a little before the end of his term; and the term end before it be cut, in this case he that is to have the Land, not the Executor or Administrator of the Lessee for years, shall have the corn.

If there be Tenant for life, the remainder in Fee of a Tenancy, and the Lord grant his Seigniorie for life, and after he in remainder in Fee of the Tenancy die, his Heir within age, and after the Lord die, and after the Tenant for life dye, in this case the Heir and not the Executor or Administrator of the Lord shall have the Wardship.

Co. 2. 99.

If one be seised of Land in Fee, and make a Lease for years rendering rent at *Michaelmas*, or within ten days after, and the Lessor happen to die during the term after *Michaelmas*, and before the ten days expired, in this case the Heir of the Lessor, and not his Executor or Administrator shall have the last half years rent due at *Michaelmas*.

Hill. 7 Jac.
B. R. per
Curiam.

If one grant a rent in Fee, and grant withal that if the rent be behinde, the Grantor shall forfeit 20 s. *coming pence* to the Grantee and his Heirs, and the rent is behinde, and the Grantee die, in this case his Executor or Administrator, not his Heir, shall have this money that is forfeit already. So if one make a Feoffment in Fee of Land, and the Feoffee doth covenant to do divers things to the Feoffor, *Et quous defolius fuerit*, &c. that he shall forfeit to him and his Heirs five pound, and the Feoffee doth fail and break his covenant divers ways, and the Feoffor dieth, in this case his Executor or Administrator, not his Heir shall have and recover all the forfeitures that are past.

F. N. B. 126.
Fitz. Co.
covenant 17.
Dier. 26.

If a Bishop, Parson, Vicar, Master of Hospital, or any Body Politique be possessed of any Goods or Chattels in their own right and die, these shall go to his Executor or Administrator, not the Successor of such a person. And albeit such things be granted to them

Co. 4. 66.
Perk. 126.
58.
Co. super
Lit. 46.

them and their Successors, yet their Executors and Administrators, and not their Successors shall have it. But if a Corporation aggregate, as Dean and Chapter, Mayor or Commonalty and the like, have any Goods or Chattels in right of their Corporation, and any of the Heads or Members thereof die, the Executors or Administrators of such person shall not have them, but they shall continue in succession with the Corporation.

An Executor or Administrator shall have the benefit of a pardon granted to the deceased, and shall have advantage of any error in any outlawry against the deceased, and have restitution of the goods forfeit thereupon.

The Executor or Administrator of a woman that hath a Husband shall have by right of his Executorship or Administration all Actions, Rights, and Titles to any Chattels, and Possibilities, and things of that nature which the wife had before the marriage, and which fell to her during the marriage; for these things the Husband shall not have by the intermarriage after his wives death, as he shall have all the rest of her Goods and Chattels: except he have them as Executor or Administrator to her, as he may be. And if such a woman have any Goods or Chattels as Executrix to another, her Executor or Administrator, not her Husband shall have these also, for she hath these Goods in anothers, and not in her own right.

Husband and Wife.

If I have any Goods or Chattels in Joynt-tenancy with another, as if a Lease be made of Lands to me and another for years, or a Horse or other Chattel personal be given or granted to me and another, in these cases if I die, my Executor or Administrator shall not have any part of these goods or chattels: but the other surviving Joynt-tenant shall have them all. But otherwise it is of the Goods and Chattels that I and another have in common. And therefore if I and another have Goods and Chattels in that nature as before: and he, or I grant that which doth belong unto us thereof unto a stranger; in this case the stranger, and him of us two that hath kept his part are Tenants in common of the things, and therefore if either of us die, the part of him that dieth in the Goods and Chattels shall go to his Executor or Administrator, and not to the other Tenant in common.

If I have a Judgement for Land in a real mixt Action, and for damages recovered in the same Suit, and I die, in this case my Executor or Administrator not my Heir shall sue execution for, and recover the damages, but not for the Land. So if I recover damages against another for the detaining of my Charters, and die, my Executor or Administrator shall recover the damages, but the Heir shall have the Charters, and the Heir must sue his *Scire facias* for the Charters ere the Executor can sue for the damages. Also if I recover any debt or damage in any personal Action, my Executor

or

Co. 6. Bo.
Dist. 207.

Co. Super.
Dist. 351.
Plow. 294.
492.

Mr. Gell.
Dist.
Perk. Sect.
Dist. 126.
Lit. Sect.
320, 321.

Exec. Executors 53.
Dist. 117.

Co. 6. Bo.
Dist. 207.
Co. 6. Bo.
Dist. 207.
Co. 6. Bo.
Dist. 207.
Co. 6. Bo.
Dist. 207.

or Administrator shall recover and have this. See more *infra* at Numb. 39.

26. What an Executor may do by virtue of his Executorship. And the power of an Executor Administrator or Ordinary.

The power and interest which the Executor hath is wholly by the Will. And hence it is that an Executor whether he be absolute or conditional whilst he is Executor, may do any thing as Executor (except onely sue for debts and duties due to the Testator) as well before the Probate of the Will as he may do after; for before the Probate he may enter into and seise the goods and chattels whatsoever they be, or give power to another so to do: and if any of them be taken or kept from him, he may have an action of trespass, or a Replevin to recover them; he may give or sell any of the goods or chattels, he may pay any of the debts due from, and receive or release any debts due to the deceased. But it is otherwise in the case of an Administration; for in as much as his power and interest is given to him wholly by the Administration, therefore he can do nothing until the Administration be granted. And yet in this case, as to the goods taken away before the Administration, the Administration shall have such a relation as to give the Administrator an Action for them. But otherwise after the Administration is granted, the interest and power of the Administrator is equal to and with the power and interest of the Executor. And yet it is otherwise of the power and interest of the Ordinary, for howsoever it seems by the antient Common Law he might seise, preserve, give, grant, and dispose the goods of the Intestate to pious uses, yet might he not sue for the goods or debts due to the intestate, no more then he might be sued for any debt due from the intestate, and at this day he may onely keep and preserve the goods of the deceased until administration be granted, and sue him in the Court of the Ordinary, that doth detain the goods from him, and perhaps may sue him that shall take the goods out of his possession: for he may not sell or give the goods of the deceased, nor receive or release any debts; for in case where there is an Executor made that is capable, &c. he is not to meddle at all with the estate until the Executor refuse: And where there is no Executor that the party is dead intestate, the Ordinary is presently to commit the Administration to the nearest of the kindred, which when he hath done, his power is at an end, for it is doubted of some whether he may repeal an Administration without cause or not; but it hath been clearly held by all, that he may not dispose of the estate afterwards, and that he hath not power to enforce the Administrator to give portions to children out of the estate, and that if he do go about it either before or after the granting of the Letters of Administration, the Administrator may have a Prohibition. * And accordingly divers have been granted; and yet notwithstanding it seems this course is usual: And Prohibitions not often granted at this day.

Co. 6. 12. 2.
38. 5. 27.
Flow. 280.
9 Ed. 4. 47.
26 H. 6. 7.
First Ad.
ministrat.
26.

Co. 2. 135.
9. 19.
Dier. 255.
Westm. 2.
cap. 20.
31 Ed. 3. 11.

Hil. 13 Jac.
Co. 2. Hen-
dows case.
Trin. 2 Jac.
Co. 2. Da-
vis case.
Hil. 2 Car.
Co. 9. F. 9.
theries
cases

Lit. fed.
59.
Plow. 281.
Bro. Ex-
ecutor 129.

Dier. 2.

Plow. 543.
544.

Plow. 184.
343.
Co. 5. 28.

The Ad-
dition of
John Do-
bridge
seemeth 93
Kew. 62.
27 H. 8. 22
Plow. 345.

Co. 5. 28.

An Executor or Administrator may after the death of the deceased enter into the house where the deceased lived, and where he died, and where the goods are, and take them away and justifie it; but he must do it within convenient and reasonable time, as within thirty days after his death or thereabouts, and in a quiet and fair manner when the door is open, &c. He may keep any of the goods of the deceased, so as he pay or lay out as much of his own money in and about the Administration of the same estate. He may if he wants money to discharge Funerals, or pay Debts, sell any of the Chattels real or personal whereof the deceased died possessed, and that albeit the thing in particular be devised: As if a man be possessed of a term of years *inter alia*, and devise the same term to *JS*, the Executor or Administrator notwithstanding this devise, may at any time before assent given to the Legacy, if he have not assets to pay the debts, sell this term, and the Legatee is remediless. And so he may do also albeit there be enough besides to pay the Debts and he have no need, but then in this case the Legatee shall have some relief in a Court of Equity against the Executor or Administrator for damages, but the sale is unavoidable. An Executor or Administrator may retain so much of the estate as to satisfy his own debt first, if any be due unto him. And if he have enough to pay all the Debts and Legacies, he may pay them in what order he will, without danger to himself or wrong to Creditors or Legataries. And if he hath not enough, he may pay them in what order he will, but not without danger to himself. But if any thing be due to himself, he may pay that first of all; and for others that are in equal degree, he may pay which of them he will first. And for the Legataries, he may prefer which of them he will, or pay one of them his whole Legacy, and pay another a part of his, or not pay him any part of his Legacy, if there be no assets to do it. But an Executor or Administrator may not sell any thing that is given in special to a Legatee to pay another Legacy given to another Legatee, nor compel a Creditor or Legatee to take some of the goods of the deceased for his Debt or Legacy whether he will or no, nor devise the goods he hath as Executor or as Administrator, neither can Executors or Administrators make division of the goods amongst them.

An Infant: that is an Executor; after the time he is capable, hath as much power as another Executor of full age; for he may sell the Goods, receive Debts, and make Releases for the moneys he doth receive, assent to a Legacy when Debts are paid, sue, and be sued, as another Executor. And he is onely disabled to do any thing to hurt himself; And therefore if he release a Debt before he receive it, the Release is void; and if he assent to a Legacy before the Debts are paid, the assent is void; and if he do any other act

Infant.

act which will be a wasting of the goods in an Executor that is of full age, it shall not binde him. And it seems that howsoever an Infant Executor after seventeen years of age may sell any of the Chattels personal he hath as Executor, yet that after his age of seventeen years and before he is one and twenty years of age, that he cannot sell a Lease for years he hath in the right of his Executorship, but that such sale is void.

And so
was it held
by Justice
Hulton at
Sarum Ab-
tizet 21 Jac.

Woman Co-
vert.

A woman covert that hath a Husband, and is an Executrix may do any lawful act as another Executor may do, but she may not do any thing to prejudice her Husband, as release a Debt before it be paid, assent to or deliver a Legacy before the debts be paid, or the like: and yet the Husband himself may do so.

Bro. Exe-
cutor 191.
142.
Fitz. Exe-
cutor 55.
Co. 5. 42.

27. The office,
duty, charge
of an Execu-
tor or Admi-
nistrators, and
of the Ordina-
ry.

The office and duty in general of an Executor or Administrator is, to dispose all the estate of the deceased wherewith he hath to do.

Co. 8. 111.
Doct. & 2.
75.
Plow. 449.
Kelw. 64.

1. Truly, not to convert any of it to his own use, but to the use and best advantage of the deceased, nor to labor by any undue practise or means to hinder any Creditor of his debt. 2. Lawfully, to pay Debts and Legacies in that order the Law prescribeth.

3. Diligently, *quia negligentia semper habet comitem infelicitium*; but more particularly, The first duty or care of an Executor or Administrator after he hath taken upon him the charge of the Administration of the Goods and Chattels of the deceased after the goods are laid up, is to see the body of the deceased laudably interred according to his rank and quality; wherein let the Executor or Administrator take this caution by the way, not to exceed in Funeral pomp, especially if it be so that the estate will scarcely reach to pay the debts; for let his expences be what they will, the Judges (who in this are to determine what shall be allowed) will allow what they please, and they are pleased in such cases to allow but a small matter; and whatsoever the Executor or Administrator doth lay out more, he must bear out of his own estate, if he have not enough besides to pay the debts. The second duty and care must be to make an Inventory, i. a Schedule containing a true and perfect description of all the goods and chattels of the deceased at the time of his death, as of his Wares, Merchandizes, Emblements and the like, with their apprizement and value, and of none else, and of all Debts due to him and from him. And this must be made by and before two of the Creditors or Legataries of the deceased (if there be any such, and they will do it) and two others; or in case they refuse, by and before two other men of the honest neighbors. And herein let the Executor or Administrator take this caution by the way, not to intermeddle with the goods before he hath done this; for howsoever he may do any act as Executor before the Inventory be made, yet the Ordinary may punish this upon him except it be done with the Ordinaries licence, who in this case may give what time

Doct. & 2.
35.
St. 21 H. 3.
Dier 166.
Swin. part
6. sect. 67.
8, 9, 10.

Secondly, in
making an In-
ventory.

he

he will for the doing of it; and until the Inventory be made and put in, it shall be presumed against the Executor or Administrator that he hath Assets in his hands to pay all men; and besides, until this be done he cannot deduct to satisfy his own debt first, and bar other men by Plea. But of the other side, when he hath made and exhibited a true and perfect Inventory of all the Goods and Chattels, it shall be presumed against him that he hath so much as is contained in the Inventory and no more, unless more can be proved by Witnesses.

3. The third thing whereof the Executor or Administrator is to take care, is to prove the Will if there be any: And this the Ordinary will compel him to do, but otherwise he may do any thing as Executor, save only sue Actions as well before Probate as after.

4. The fourth thing whereof the Executor or Administrator must take care, is to sell and make money of the Goods and Chattels, and to receive the Debts due to the deceased, and then to pay the Debts and Legacies due to the Creditors and Legataries, wherein the Executor or Administrator must be very cautious and wary. And for this purpose let him observe, That all the Debts must be paid before any Legacies be paid or delivered; and if there be not enough besides to pay the Debts, any thing given by way of legacy may be sold to make money to pay the Debts, and the Legataries must lose their Legacies, for *Legatarii continentur de lucro capiando, Creditores autem de damno vitando*. And in payment of debts this decorum must be observed. 1. Amongst persons that are Creditors, the Executor or Administrator himself shall be preferred, so that if any Debt be due to him, he may deduct to satisfy himself first, albeit others lose their whole Debt thereby, and especially then when his Debt is in equal degree with other Debts.

2. After the Executor or Administrator is served and satisfied his Debt then the King is to be preferred, so that if there be any Debt due to him, and he begin his Suit for it before any other man can get a Judgment for his Debt against the Executor or Administrator, his debt shall be paid before any others. 3. After the King is served and satisfied his Debt, then the Debts of common persons must be paid. And these also must be paid in this order or manner:

1. The Debts due by Record by any Judgement had against the deceased in any Judicial proceeding in any Court of Record. 2. The Debts due by Statutes or Recognizances entred into by the deceased; for the Debts due upon Judgements must be satisfied before these, *scilicet iudicium primum vel posterius*. 3. The debts due by Obligations and penal and single Bills, for these are in equal degree, and these are to be paid after Statutes and Recognizances. And yet if the Statute or Recognizance be onely for performance of Covenants, and no Covenant is broken, an Obligation for the payment of present money shall be discharged before it. 4. The Debts due for

Thirdly in Probate of the Will.

Fourthly, in payment of Debts and Legacies; and the order of payment of Debts and Legacies.

See Probate infra Numb.

Co. 9. 88.
Plow. 184.
5411
Dier 80.
Doct. & St.
75. 76. 77.
78. 83.
Stat. 33 H.
8. cap. 19.
Co. 5. 18.
4. 54. 59.
60. 8. 134.
Dier 232.
32. 21 Ed.
4 21.
Bro. exec.
86. 172.
Co. 8. 133.
Dier 32.
Plow. 179.
280.
Bro. Executor. 103.
Kelw. 74.

Reit

rent upon Leases of land, or grants of Rents; but some say that Debts due for Rent in the Testators life time (be the rent reserved upon Leases made by, or without Deed for years, or at will) are in equality of degree with Debts due upon especialties.

5. The debts due for servants wages and Workmen. 6. The debts due upon Shop books and verbal contracts: and yet it is said by some, That Legacies are to be paid before debts due by Shop-books, Bills unsealed, or Contracts by word, *Quid non credo*. And amongst debts also that are in an equality of degree, those that are due are to be paid before those that are not due, and those whose day of payment is already come before those whose day of payment is not yet come: And yet if the Creditor whose day of payment is already come, do not sue for his debt, until his debt whose day of payment is at a day to come, become due, the Executor or Administrator may satisfy which of them he will first. And amongst debts that are due and already to be paid, those that are first sued for, are to be first paid: Or if the Creditors begin their suits together, the Executor or Administrator may pay which he will of them first, and to pay debts in any other order is dangerous: And therefore for the purpose, if the deceased owe two several debts of Ten pounds a piece to two several Creditors by several Obligations, and the Executor or Administrator hath enough onely to pay one of them, he that can first get Judgement and Execution shall first be satisfied, and if the Executor or Administrator do afterwards pay the other his debt, he must satisfy the first out of his own estate. If one that hath a debt due to him from the deceased upon a simple Contract, or the like, sue the Executor or Administrator for it, and there be debts due to others upon Bonds and Bills unsatisfied, in this case the Executor or Administrator may not pay this debt, nor may he suffer the Plaintiff to recover in his Action; for if he do, and he have not Assets besides to satisfy the debts due upon Bills and Bonds, he must satisfy so much out of his own estate as he hath so paid, or suffered to be recovered from him; for in the case of an Action brought, he is to plead and to set forth these debts upon Especialties, and to say that he hath no more but what is sufficient to satisfy them, &c. and thereby he shall bar the Plaintiff in his Action. In like manner it is, if one that hath a debt due to him from the deceased upon an Obligation, sue the Executor or Administrator thereupon, and there be debts due to others upon Judgements, Statutes or Recognizances and the Executor or Administrator suffer the Plaintiff to recover the debt due upon the Obligation for want of pleading the Judgements, &c. or doth voluntarily pay that debt, and he hath not Assets besides to pay the debts due upon Judgements, &c. in this case, he must pay so much out of his own Estate towards the satisfaction of

Addition
to Just,
Dordr. 92

the

the said debts due upon Judgements, &c. as he hath paid of the debt due upon the Obligation. But here it must be noted that no Judgement or Statute that is discharged, or is left and suffered to lie by agreement to bar others of their Debts, shall be any bar to others that sue for their due Debts upon Obligations, &c. and therefore if any Executor or Administrator shall plead any such Judgement, &c. in bar of any other Debt sued for by any other Creditor, the Creditor may by special pleading set forth this matter of Covin, and avoid the plea and bar of the Executor or Administrator. If one Creditor whose debt is in equal degree and presently due and to be paid, begin a suit against the Executor or Administrator for his debt, and he hath notice that the Suit is begun against him, or the Action is laid in the County where the Executor or Administrator doth dwell, or (as some have said) in London, (in both which cases, it seems he is bound to take notice thereof at his peril) and after this Suit begun, he doth make voluntary payment of another Debt in equal degree in all respects for which no Suit is begun, this is a *devastavit* in the Executor or Administrator, and if he have not Assets to satisfy him who began his Suit first, he shall be compelled to satisfy so much thereof as he doth voluntarily pay to the other, and that out of his own estate: And yet an Executor or Administrator may make voluntary payment of any debt due by Record, as by Judgement, Statute, &c. after such a Suit begun and justify it. If two Creditors in equal degree to all purposes begin to sue for their debts at one time; in this case, the Executor or Administrator cannot safely make voluntary payment to either of them, unless he have enough to pay them both; but his safest way is to pay his first, that in a due and legal proceeding (for he may not covinously help one of them to a Judgement sooner) can first recover it by Judgement and execution: And yet if in this case no Suit be begun, the Executor or Administrator may make voluntary payment to either of them in equal degree of his whole debt, altho he have no Assets left to pay unto the other any part of his debt. If *A* and *B* be two Creditors in equal degree, and *A* begin his Suit first, and after *B* doth begin his Suit, and it happened that *B* bona fide without any Covin or agreement between him and the Executor or Administrator, doth get judgement and execution first; in this case the Executor or Administrator may make payment to *B* first of all. But if the Executor or Administrator doth by any covin and agreement help *B* to his Judgement and execution first, and by this means he is first satisfied, if there be not enough left to satisfy *A*, he must satisfy him out of his own estate. If two Suits begin at or about one time upon two several Obligations, and the Executor is forced to plead to them both before

fore either of them hath a Judgement, so that he cannot plead the Judgement that the other hath against him, and he hath not Assets to satisfie both the Debts sued for, and after the Plaintiffs in both the Suits get judgement and execution. *Quæritur* what the Executor or Administrator may do in this case: And here note by the way, that it is policy for a Creditor that hath cause to sue an Executor or Administrator, to be doing betimes, and to get Judgement and execution as soon as he may; for it falleth out in this case, That he that doth first come shall be first served: After all the Debts are paid in such order and manner as before, then is the Executor or Administrator to pay and to deliver the Legacies: and herein the Executor may prefer himself so, that if any Legacy be given to him, he may detain and deduct it, albeit there be nothing left to discharge the Legacies given to others: And after he hath satisfied himself, he may satisfie and deliver what Legacies he will, albeit there be not enough to satisfie all the Legatees; or he may pay to each of the Legatees a part of their Legacy, and deduct a part out of every Legacy where there is not enough to satisfie all the Legacies: But if any particular thing, as a Lease, or a Horse, or the like be given; this must be delivered accordingly, and may not be sold by the executor or administrator to pay others all, or any part of their Legacies: And if there be enough to pay all the Legacies, they must be paid all according to the Will; and it is said by some, that if an executor or administrator make no Inventory of the goods, that he must pay all the Legacies whether he have Assets or not. The last thing an executor or administrator is to take care of, is to make an account (for it is held that an executor or administrator is not bound in Law or Conscience to make restitution for personal wrongs) wherein this is to be known. That the Ordinary may if he will call the executor or administrator to account concerning the goods and chattels of the deceased either generally or particularly as the case requireth; and that with or without the Creditors or Legataries instigation, within a year or what time he will; unto which account he may call all the Creditors and Legataries, and therein the executor or administrator must shew what he hath received, and what he hath laid out, and prove it in such sort as the Ordinary shall like: And then if it be found, he hath faithfully and fully administred, the Ordinary may acquit him of the burthen, and then he is discharged of all Suits in the Spiritual Court; but this account and discharge will not help nor avail him at all to discharge him of Suits at the Common Law.

The Office and duty of the Ordinary after the death of any person within his Diocese, is, if he hear of any Will made, and any Executor appointed, to cite the Executor, and to compel him to come in and prove the Will, and to accept and take upon him

the

Doch. & St.
34. Plow.
345. Swin.
110, 114.

Swin. par.
6. sect. 17.

Fifthly in making an Account.

Co. 5. B.
9. 39.
Lit. Bro.
sect. 233.
F. N. B. 130.
Dier 233.
Doch. & St.
132.

Bro. Exec-
utor. 909
Testament
27. Sta. 21
Ed. 3. c. 37.
39 Ed. 1. 39.
31 H. 8. 55

the administration of the good, or to refuse it: and if the Executor refuse, or if there be a Will made and no Executor appointed, the Ordinary must commit the Administration *cum testamento annexo* to whom he shall think fit, and take Bond of the Administrator to perform the Will. And if there be no Will made, he is to grant the Administration of the goods to the next of kin, if he or they require it; and if not, to whomsoever besides shall desire it, or if no body seek it, he may grant Letters to whom he will *ad collegendum bona defuncti*, and thereby take the goods of the deceased into his own hands: and then it seems he is to pay therewith the Debts and Legacies of the deceased, so far as the same will reach, in such order as the Executor or Administrator is to pay them. See more of this question in Numb 29. *infra*.

a West. 7.
c. 22.
b F. N. B.
317.
c Dict 322.
d Co. 1. 41.
e Co. 6. 80.
f Co. 9. 80.
g Stat. 9 H.
6. c. 4.
h Bro. Exec-
utor 161.
i Co. 5. 27.
k 7 H. 4. 6.
l Co. 4. 50.
m Bro. Exec-
utor 169.
n Bro. Exec-
utor 182.
o Co. 9. 82.

An Executor or Administrator regularly shall charge others for any debt or duty due to the deceased, as the deceased himself might have done; and the same actions the deceased might have had, the same Actions for the most part the Executor or Administrator may have also: And therefore he may have an Action of Account, an Action of Trespass *de bonis asportatis in vita Testatoris*, an Action of Debt against a Goaler upon the escape of a prisoner, a Writ of Error upon the Statute of 27 Eliz. an attaint upon the Statute of 21 H. 8. a Writ of restitution upon the Statute of 21 H. 8. an Action upon the case upon the *assumpsit* of the Testator, an *Indemnitate nominis* when the deceaseds goods are taken upon an Our-lwry against another man of his name, an Action of Covenant for breach of a Covenant made to the deceased, an Action upon the case upon the Trover and Conversion of the goods of the Testator, an *Ejectione firme* for an Ejectment of the Testator out of a Term, an Action of Debt for the Rent behinde in the life time of the deceased, an Action of Debt for the arrearages of an annuity due to the Testator in his life time, and a Ravishment or Ejectment of guard for a wrong done to the deceased. But an Executor or Administrator shall not charge another, or have any Action against him for a personal wrong done to the Testator, when the wrong done to his person or that which is his, is of that nature as for which damages onely are to be recovered: And therefore an Executor or Administrator cannot sue another for the beating or wounding of the deceased, or for a Trespass done to him in his cattel, grass or corn, or for waste done by his Tenant in his Lands; for these are said to be personal Actions which die with the person, according to the rule, *Actio personalis moritur cum persona*.

28. Where and how an Executor or Administrator shall charge others in respect of the estate of the deceased, and what actions and remedy he may have against others, and what not, and how.

36 H. 6. 7.
Co. 8. 135.

If the Testament be kept from the Executor, he may have remedy to recover it in the Spiritual-Court: So if the goods of the deceased be kept from him, he may sue there for them if he will, or

he may sue in any Court of Common Law. And if there be a Will, and an Executor made, or two Administrations granted together, he that is rightful Executor or Administrator may sue the wrongful Administrator for the goods in his custody.

If one grant a Rent out of his land for life, provided that it shall not charge his person, and the rent is behind, and the Grantee dieth, in this case the Executor or Administrator of the Grantee may have an action of debt for these arrearages.

Co. super
Lit. 146.

If any rent or arrearages of rent be due to me upon a grant of rent out of any land to me, or reservation of rent upon any estate made by me of land; in these cases, my Executor or Administrator may have an action of debt for this rent, or he may distrain for it, so long as the land chargeable with the rent, and out of which it doth issue, is in his possession that ought to pay it, or in the possession of any one that doth claim by or under him.

Co. 4. 50.
Stat. 32 H.
8. cap. 37.

If any of my household servants do convey away and eloin or destroy any of my goods; any Executor or Administrator may have a special Commission out of the Chancery to enquire of, and to punish it.

See Stat. 33.
H. 6. cap. 1.

And in case where a man doth sue as Executor or Administrator, he must in his action name himself as he is, i. e. if he be an Executor, he must name himself so, and if an Administrator, he must name himself so: and if there be many Executors, and some accept and some refuse, if they bring any action, they must be all named in the Writ: and yet if one Executor have goods in his possession and he alone sell them, perhaps for this contract he may bring an action for the money in his own name; so also if the goods be taken out of his possession alone, it is said he alone may sue for them: but the safest way in these cases, is to sue in the name of all the Executors: for the possession of one of them is said to be the possession of all of them.

Co. 5. 33.
B. o. Tuck-
pals 346.
Fitz. Exe-
cutors 14.

29. Where and how an Executor or Administrator shall be charged by others, and what actions and remedies may be had against him, or not.

An Executor or Administrator regularly shall be charged by others, for any debt or duty due from the deceased, as the deceased himself might have been charged in his life time, so far forth as he hath any of the estate of the deceased to discharge the same. And therefore if a man binde himself by Obligation or Covenant to pay money or do any such like thing, and do not binde his Executors or Administrators by name: in this case, the Executor or Administrator may be sued and may be charged as far forth as if they were named. And yet where the Covenant is but personal, as where one doth make a Lease for years, and the Lessor doth Covenant to pay the quit-rents, but he doth not say during the term, by this it seems the Executor or Administrator of the Lessor shall not be charged. An Action of the case lyeth against him upon an Assumpsit or the simple contract of the Testator, especially where

Co. super
Lit. 205. 5.
17. Dier 14.
21. 182.
Doct. & Sta.
B. o. De-
cent. 53.

Co. 9. 86.
Plow. 132.

F.N.B. 111

9 H. 6. 35.

11 H. 4. 45.

where the ground of the ~~debt~~ *debt* is a true debt, a *rationabili parte bonorum* lieth against him; a Detinue lieth against him for the goods delivered to the deceased, if the Executor or Administrator do still continue the possession of them: also an action of debt lieth against him for arrearages of account found upon the deceased before Auditors.

Sta. 35 Ed.

a. cap. 11.

The Executor or Administrator of the father that hath levied aid of his Tenant for the marriage of his daughter, and shall charged with it, and the daughter may sue for it.

F.N.B. 56.

The Executor or Administrator of a Guardian in Chivalry that doth commit waste in the Wards lands, shall be charged and may be sued by the Heir for it.

Co. 3. 12.

Co. 3. 94.

If a man possessed of a term of years, devise it to another, and the Executor or Administrator of the Devisor before the assent to the Legacy, doth commit waste in the Land in Lease; in this case, he shall be charged with, and may be sued for this Waste by him in reversion: But if the Executor dye, his Executor shall not be charged with it; for it is a personal wrong that dieth with the person.

Dier 370.

If a Bishop grant an annuity out of his lands to 1 s for life and die; in this case it seems the Executor or Administrator of the Bishop shall be charged with the arrearages due in the Bishops time.

Bro. Exe-

cutor 127.

Co. 3. 14.

32.

If a Lease for years be made rendring rent, and the rent is behinde and the Lessee die; in this case the Executor or Administrator of the Lessee shall be charged for this rent. So also if Lessee for years assign over his interest and die, his Executor or Administrator shall be charged with the arrearages before the assignment, but not with any of the arrearages due after the assignment.

Bro. Exe-

cutor 157.

The Executor or Administrator of a Customer or Comptroller shall be charged upon a Tail of the Exchequer, shewed to the Testator.

Westm. 21

cap. 35.

The Executor or Administrator shall be charged for a ravishment or ejectment of Ward by the deceased.

Trin. 7 Ja.

B. R.

F.N.B. 98.

The Executor or Administrator may be charged in the Spiritual Court for Tythes due from the deceased: but he may not (as it seems) be sued in any Temporal Court for them.

Curia 21

Jac. B. R.

The Executor or Administrator of a man that recovereth a debt upon a Judgement had by the deceased, shall be chargeable with restitution, if the Judgement be reversed for error.

Co. 3. 87.

F.N.B. 117.

Dier 322.

11 H. 4. 46.

Doe & St.

76. Co. 8.

94. 133.

An Executor or Administrator shall not be charged for any personal wrong done by the deceased, and therefore no action may be brought against him for any such cause, as because the deceased did burn the Deed of the Plaintiff, suffer a Prisoner at his Suit to escape, cut down his trees, eat up his grass, beat or wound the

body of the Plaintiff, defame him in his name, or the like; for all these are said to be personal Actions that die with the person, neither is there any remedy to be had against the Executor or Administrator in equity in these cases, neither shall he be charged in any action of account, for any receipt or occupation by the deceased. And yet perhaps an action of the case may lie in this case; neither will an action of debt lye against him upon the simple contract of the deceased, but an action of the case only. Neither will an action lie against an Executor or Administrator upon an arbitrement made in the lifetime of the deceased, albeit it be made in writing. Neither will any action lie against an Executor or Administrator for costs given in the Star-chamber or Chancery against the deceased in a Suit there, but when the party dieth, the same is lost: and where a man doth sue an Executor or Administrator in a Suit, he must charge him as he is, viz. if he be an Executor, he must sue him by that name, if an Administrator, then by that name. And where there be many Executors, and have all accepted, they must be all sued; but if some of them have refused perhaps the Suit may be good enough against the rest. But otherwise one Executor cannot be charged without his companions, except it be in the case of Summons and Severance, and in some special case where one alone doth detain the wrong, and the like, as where one Executor alone doth detain the Deeds from the Heir; for in this case he alone may be charged. See more *infra* at Numb. 39.

30. What act one Executor or Administrator alone may do; and where the act or laches of one may prejudice or bar his companion, and where not.

All the Executors where there be more then one, be they never so many, in the eye of the Law are but as one man; in which respect the Law doth esteem most acts done by or to any one of them, as acts done by or to all of them. And therefore the possession of one of them of the Goods and Chattels of the deceased is esteemed the possession of them all: payment of Debts by or to one of them, is esteemed a payment by or to them all: The Sale or Gift of one of them of the Goods and Chattels of the deceased, is the Sale and Gift of them all: a Release made by or to one of them, is a Release made by or to them all: and the assent of one of them to a Legacy, the assent of them all. And therefore if there be two Executors, and one of them deliver up the Obligation to the Debtor whereby he is bound, the other Executor shall not recover him in a Detinue. So if two Executors have Lands and Goods in execution, and one of them release all his interest, this is a total discharge of the Execution. And yet if in this case there be any practise between the Executor and the Creditor in this matter, and there be no Assets besides to pay all the Debts and Legacies, here perhaps the other Executor may have remedy in equity against his Co-executor and the Creditor. But how the Law is of Administrators, *quære*; for some think that one

Adjudge
Hil. 40 El.
R. R. Bow-
yers case.

Hil. 7 Jac.
R. R. per 3
Justices.
Co. 9. 39.
40.
Bro. Exe-
cutor 78.
136. 156.
Fitz. brief
341.

31 Ed. 4. 31
4 H. 7. 4.
26 H. 7. 4.
Bro. exec.
66. 30. 65.
2 Ed. 4. 13.
Fitz. Exe-
cutors 10.

Adjudge
M. 39. 40
Eliz. bur.

Grom. Jur.
45.
4 H. 7. 4.

of

of them also may sell goods, release debts, plead to actions, or the like, without the other.

Dier 210.
Co. 4. 31.
Addition
to Justice
Dodr. 4.

If one Executor attorn to the grant of a reversion, or a rent; this is as good as if they did all attorn and binde all the rest, as in case of assents to a Legacy: for in this case the assent will binde the rest, albeit there be not enough to pay the debts besides the Legacy given away by assent, but his assent will not hurt his Co-executors in a *Devastavit*.

Co. 9. 3.
Dier 210.

If one Executor appear to an action sued against them all, or plead a Plea to it, this for the most part shall be said to be the appearance and Plea of them all, and shall binde the rest.

Dier 319.
210.
16 H. 7. 4.

If two Executors sue together, and one of them is summoned and severed; in this case he that is summoned may before judgment release the duty; but if the other prosecute to Judgment first, and then he that is severed acknowledge satisfaction, this will not benefit the Defendant, nor bar the rest that are Plaintiffs in the Judgment. And if three Executors sue, and two are summoned and severed, and the three recover and dye; in this case the other two shall have execution. See more at *Numb. 27. supra*.

27 H. 8. 21.
6 H. 7. 5.
Plow. 343.
Fitz. Exec. 6

One Executor or Administrator cannot give or sell any of the Goods or Chattels of the deceased to another Executor or Administrator; and therefore they may not make division of the goods amongst themselves, and regularly one of them cannot sue another of them. And therefore if one keep, give, or sell all the goods, release debts, or the like, in the disturbance of the execution of the Will or due Administration of the estate; it seems the other hath no remedy against him, except it be in the case of Covin before; But if all the residue of the goods and Chattels after debts and Legacies paid be given to one of the Executors alone, and after the Debts and Legacies paid, the rest do detain it or any part of it from him; in this case perhaps he may have some remedy against them.

31. What act one Executor may do to another. And what remedy or action one Executor or Administrator may have against another or not.

11 H. 4. 83.

If the Debtor make his Creditor and another his Executors, and the Creditor doth refuse the Executorship, and the other doth accept it, in this case the Creditor may sue the Executor for this debt: But if both prove the Will, and the Debtor die, the surviving Co-executor cannot sue the Executor of the Debtor for this debt. And if one make a woman and two others his Executors, and a Creditor before she doth accept of the Executorship doth marry her; in this case he may sue the other Executors for this debt; but if she have accepted of the Executorship first,

contra.

Plow. 541.
Co. 532.
Doct & St.
75.
Perk. feci.
488, 570.
Kelw. 590.

A *Devastavit* or waste in an Executor or Administrator is when he doth mis-employ the estate of the deceased, and misdemean himself in the managing thereof against the trust reposed in him.

32. *Devastavit*, *Quid*.

what shall be
said a *Devastavit*, and wast-
ing of the
goods of the
deceased by
an Executor
or Admini-
strator, and
how he shall
be charged
thereupon.

And this may be done divers ways. As 1. When the Executor or Administrator doth bestow more upon the Funerals of the deceased then is meet, having respect to his degree and estate. 2. When he doth pay Legacies in money, or assent to Legacies given in other things before the debts are paid, and hath not enough besides to pay the debts. 3. When he doth not pay the debts in that order and manner as is before set down, but doth pay them first he should pay last, and he hath not enough to pay them all. 4. When he doth release a debt or duty due to the deceased before he doth receive it, or when the goods of the deceased being taken from him, he doth release to him that doth take them the action whereby he may recover them. 5. When he doth sell the goods of the deceased much under value, especially if it be with Covin, as to his near Friends, to his own use, to have money under-hand, or the like: but otherwise to sell them under value, especially where he cannot conveniently make more of them, is no waste. All these and such like acts as these are said to be a waste in an Executor or Administrator; and being discovered against him by the return of the Sheriff, (or as some think by enquest of office) it will produce this effect, to make the Executor or Administrator chargeable for so much as he hath mis-employed and wasted *de bonis propriis*, so that any Creditor may charge him for the debt due to him from the Testator as for his own proper debt, and for so much the execution shall be made against him upon his own body, lands and goods; and yet so as one Executor or Administrator shall not be charged for the waste of another, for if there be many Executors and one of them onely doth commit the waste, he onely shall be punished for the waste. And the Executor or Administrator if he do commit a waste in the gift or sale of goods, shall answer it alone: for he to whom the goods are given or sold shall not be punished for it, neither shall the Executor or Administrator of the Executor or Administrator be punished for it after his death. And howsoever the Husband shall be charged with a *Devastavit* for the waste of himself or his wife where she is an Executrix, whiles they both live together; yet if a woman Executrix take a Husband, and during the marriage he or she doth commit a waste, and after she die, in this case it seems the Husband shall not be charged for the waste himself or his wife did: *Sed quare* of this. For if a void Administration be committed, and the Administrator do waste the goods, and after the Administration is committed to another; in this case the first Administrator may be charged by the Creditors for the waste done in his time. But an Executor or Administrator may lawfully sell or convert the goods of the deceased to his own use, so as he convert the money to the use of the deceased, in payment of debts, or the like; and pay so much of his own money as the
goods

Dier 185.
Co. 5. 33.
Old B. of
Entries 11

Dier 270.
Doct. & St.
98.

2 H. 7. 15.
Co. 5. 27.
M. 3 Jac.
B. R.

Co. 6. 18.

Dier 3187
Plow. 543.

goods so converted to his use are worth; and these acts are not esteemed a waste in him. Also he may sell any special Legacy that is given, and this is no waste in him, howbeit it is a wrong to the Legatee if there be Assets to pay the debts besides. And when he hath enough to pay all the Debts and Legacies, then he may dispose of the whole estate how he will without any prejudice to himself at all.

Terms of the Law
Kelw. 59.
93.
Dier 105.
157. 155.
Co. 5. 32.
Bro. Executor 162.

An Executor of his own wrong is one that is neither lawful Executor nor Administrator, and yet doth take upon to do and act such things as are onely fit for, and proper to an Executor or Administrator, as to take the Goods of the deceased into his own Possession, give and sell them, pay the debts of the deceased therewith, release the debts due to the deceased, and the like. And a man may make himself such an Executor by any such intermeddling with the office and work of an Executor, as followeth: 1. By proving the Will with the money of the dead, but to prove another mans Will at my own charge, will no more make me chargable as Executor of mine own wrong, then to bury the deceased in a decent manner out of his own estate, 2. By a seizing, gaining, keeping and using of the Goods of the deceased as a mans own, especially if he convert them to his own use, sell, or otherwise dispose them, and every colour of title will not help in this case, for if a man make a Deed of gift of all his Goods and Chattels to another, and dieth intestate, and this in truth is fraudulent and in trust, and the Donee after the death of the Donor doth dispose of these Goods and Chattels as his own; in this case, and by this means he shall be esteemed as Executor of his own wrong. And yet if the Deed of gift be *bona fide* in satisfaction of a just debt, and the Goods be no more then the debt, it may be otherwise: But if the Goods be much more then the debt, there it seems it shall be charged so for the overplus, and that whether he have them in possession or not; and so was the opinion of Justice Jones at Gloucester Assizes, 9 Carol. If the Ordinary grant Letters *ad colligendum & vendendum* the Goods of the deceased that are like to perish, and *is* to whom the Letters are made, under colour thereof doth take and sell the Goods; hereby he may make himself chargable as Executor of his own wrong: For the Ordinary hath no such power himself, and therefore he may not give that power to another. If a man that is next of kin procure a Beggar, or a stranger to take out an Administration, and then to make him a Deed of gift of all the Goods for a small matter, he may be thus charged for the overplus of the worth of the Goods more then he gave. So if a Debtor procure such an Administration to be taken out, and then get a release of his Debt from the Administrator; this may make him chargable as Executor of his own wrong for so much as his Debt doth come unto. And yet a

33. Executor of his own wrong. Who shall be said to be so. And what act shall make him so to be accounted. And what act such an Executor may do, and how he shall be charged or not.

Stat. 43 El.
cap. 8.

Plich. 7 Ja.
Co. B. per
ch. Justice,

to take away his own Goods that were in the hands of the deceased without danger. And every having and possession of the Goods of the deceased will not make a man Executor of his own wrong. For if a man die in my house, and have Goods there, and I keep them until I can be well discharged of them; this will not make me chargeable as Executor of my own wrong. So if I do onely lay up the Goods of the deceased to preserve them in safety for him that shall have right to them, this will make me no more chargeable, then if I take an Inventory of all the Goods of the deceased. So if another man take the Goods of the deceased and sell them to me, or give them to me; howsoever this will make him chargeable as Executor of his own wrong, yet this will not make me chargeable so. Neither will every disposition of the Goods of the deceased make a man Executor of his own wrong, for if a man sell some of the Goods of the deceased (where there is need) to help forward a decent Faneral of the Body of the deceased, this is no such disposition as to make a man chargeable thus. So if I deliver the Wife of the deceased her necessary wearing Apparel, or if I be Wife to the deceased, and take it my self. So where I take any of the deceased's Goods into my hands, by mistake, supposing them to be my own, or under colour of Title; as when I have a good Deed of gift or sale of them without any fraud or covin: or under a good authority, as when I take them upon a Warrant from the Sheriff that hath process out of the Exchequer to take them; or as a Trespasser onely, as when I kill, or otherwise abuse the Cattel; such an intermeddling with the Goods of the deceased will not make a man chargeable as Executor of his own wrong, neither may I so be charged in these cases. The third way by which a man may make himself chargeable as Executor of his own wrong, is by delivering of the Goods of the deceased to Creditors in satisfaction of their debts, or by selling any of the goods of the deceased to pay the debts of the deceased, and paying the same with the money made thereof; but to pay the deceased's debt with a mans own money will not make him chargeable so. The fourth way, by which a man may make himself so chargeable, is by receiving any of the debts due to the deceased. The fifth way by which a man may make himself chargeable so, is by releasing any debts or duties due to the deceased. The sixth way by delivering any Legacies given by the deceased in kinde: or by paying any Legacies except it be with a mans own money. The seventh way, by taking a mans Legacy given to him before the Executor have accepted of the Executorship, and assented to the Legacy. The eighth way, by suing as Executor to the deceased for any debt due to the deceased. And the ninth way, by taking upon him to sell the Lands of the deceased as his Executor. In all these cases

Trin 17ja.
per chief
Justice.

Co. 5. 34.
Kelw. 65.

Kel 62. 52.
32 H. 6. 31.
32 H. 6. 6.
Dier 167.
Co. 5. 34.
20 Ed. 4. 17.
Fitz. Executors 133

See the
case be-
fore.

Dier 166.

Dier idem.

cases, and by all these and such like means, a man may make himself an Executor of his own wrong: So that if an Executor after he hath legally waived the Executorship, or an Administrator after his Administration is repealed and revoked, intermeddle with the estate in any such manner, he may be charged as Executor of his own wrong. And if a woman take more of her wearing apparel then is necessary and convenient for one of her rank and condition, without Legacy of the Husband, and license of the Executor, she may be charged thus.

And if a man under colour of an Administration that is not good, or of a Commission *ad colligendum bona defuncti* that is not good, or of a Will when in truth there is none at all, or no good Will, do take upon him to intermeddle with the goods, and to dispose of the estate in manner as aforesaid, by this means he may make himself chargeable thus. And in these cases and by these means such persons that do so intermeddle, do make themselves to be accounted in Law, Executors; but Executors by wrong onely, and not Executors by right. And therefore such persons have not the favor nor power of lawful Executors, as to bring any Action for Debt due to the deceased, to deduct and pay themselves any debt due to themselves first of all, and to bar other Creditors and the like. And for so much as they have so disposed and mis-employed, and no more they make themselves chargeable to any Creditor or Legatee of the deceased that shall sue them as far forth as a lawful Executor is chargeable. And albeit, he that doth thus be a Creditor, yet this will not help him; for a Creditor may not enter upon the Goods of the deceased, and pay himself first; and if he do so, if there be a lawful Executor or Administrator made, he may sue the Creditor; and if there be no Executor or Administrator made, the Creditor may by this means make himself chargeable to other Creditors, as Executor of his own wrong. for so much as he hath taken into his own hands: And then a man shall be charged the rather in these cases, and by this means when there is no Executor made; or if there be an Executor made, when he doth refuse to take upon him the Executorship, nor any Administration granted: for when a man dieth intestate, and a stranger taketh and useth the goods of the deceased as his own, albeit he pay no Debt or Legacy, nor do any other act as Executor, yet when no other man taketh upon him the Administration, this intermeddling shall make him chargeable as Executor of his own wrong: for in that case the Creditor hath no other remedy: But in case where there is an Executor made, and he doth prove the Testament, and doth take upon him the Administration of the goods, and then a stranger taketh out of the hands of this Executor, or getteth into his own hands all or some of the goods of the deceased, and useth them as his own;

this

Dier 105.

Dier 166.
32H.6.31.Dier 255.
166.Co.5.
34.9.32.Co.5.34.
Plow.148.
145.
32H.6.31.Dier 270.
Plow.184.
Co.5.32.Co.5.33.
Kelw.599.

this will not make this stranger Executor of his own wrong; for now there is a lawful Executor against whom the Creditor may have his remedy, and the Executor shall have his remedy for these goods against the stranger, for they are and shall be accounted Assets in the hands of the Executor still, notwithstanding the stranger hath the possession of them: And yet in this case also where there is a rightful Executor if a stranger shall take the goods into his hands, claim to be Executor, pay debts and Legacies, and receive debts, and intermeddle as an Executor; in this case, perhaps, and by this express Administration as Executor, he may be charged as Executor of his own wrong, albeit there be a lawful Executor: And if a man die Intestate, and a stranger intermeddle with the estate as before, and then the Administration is granted to another; in this case, the stranger may be charged by any Creditor or Legatee as Executor of his own wrong, for his intermeddling before the Administration granted, for the rightful Executor or Administrator shall be charged with no more then what doth come into his hands. And if an Administration be granted afterwards to any one that hath so intermeddled with the goods before; this will not purge the wrong done before; and therefore in this case, a Creditor may charge him as Executor of his own wrong, or as a lawful Administrator at his election.

Pasche
39 Eliz.
Co. B.
Bradbury
vers. Reynolds.

54. Administrator *durante minori aetate*; what he is, and his power, and when it shall end.

The Administrator *durante minori aetate* is a special kinde of Administrator, and is in case where an Infant under the age of seventeen years (for at that age an Infant is capable of an Executorship) is made Executor, and the Administration of the goods (as the manner is in that case) is committed to one or more of the next friend or friends of the Infant during his minority, which is untill he be of the age of seventeen years; he that hath such an Administration granted unto him, is such an Administrator. And he is sometimes general, i.e. when his administration is granted unto him without any words of limitation: and sometimes he is special, i.e. when his Administration is granted to him *ad opus & usum* of the Infant onely. In the first case he hath as large a power as another administrator hath, and therefore he may assent to a Legacy, albeit there be no assets to pay debts; he may sell any of the Goods or Chattels of the deceased, or give them away, or the like, as another Administrator may do. But in the last case it is otherwise, for such a special Administrator can do little more then the Ordinary himself, and therefore he may not sell any of the Goods or Chattels of the deceased, except it be in case where they are like to perish, for Funeral expences, or for payment of debts, nor may he assent to a Legacy where there is not Assets to pay debts, &c. And this Administration is *ipso facto* determined when the Executor doth come to the age of seventeen years; and therefore if it be granted during the minority of four Executors, and

Co. 5. 29.
6. 27. 29.

and one of them dye, or come to the age of seventeen years; now is the administration determined; And if the Executor be a woman, and she take a Husband that is seventeen years of age or upwards, in this case, it seems, the Administration is determined: And therefore also it is that if such an Administration *durante minori etate* be granted after the Executor is seventeen years of age, the administration is void.

It hath been held that the Ordinary after he hath granted the administration of the goods of a man Intestate to another, may afterwards without cause revoke the same and grant it to another, at his pleasure: and that if the Ordinary grant Letters of Administration to one, and after grant Letters of Administration to another, of the goods of the same man, that hereby the second Letters of Administration are *ipso facto* countermanded, albeit there be no words of Revocation in them. But it seems the Law is otherwise, and that after the Ordinary hath granted the Administration according to the charge and direction given him by the Statutes, that he cannot afterwards revoke it, and grant it to another without cause, *i.e.* unless the first Administration be illegally granted, as when it is granted to a stranger, and not to the next of Kin or the like, or unless the first Administrator cannot or will not administer; for in these cases he may without doubt grant the Administration to another. And yet in these cases, where there is a former Administration granted regularly, all acts that the first Administrator doth lawfully execute and do as Administrator, as sale of goods, payment, or receipt of debts, making Releases, and the like, are good and shall binde the next and succeeding Administrator. And therefore, if the Ordinary after the death of a man intestate, doth grant the Administration of his goods to a stranger, and then the next of kin doth sue by Citation to have it repealed, and the first Administrator hanging that Suit in the Spiritual Court, doth sell the goods of purpose to defeat the second Administration, and after the first Letters of Administration are revoked by sentence, and the first sentence annulled, and the Administration is committed to another; in this case, the second Administrator cannot recover these goods or have any remedy for them. And yet perhaps if there be any fraud in the case, an Executor may have relief upon the Statute of 13 *Eliz.* But if the first Suit and sentence be by Appeal avoided, then all that the first Administrator doth is void, and the second Administrator may recover the goods notwithstanding the sale: and if the first Administration be upon condition, all the acts the Administrator doth before the condition is broken, are good; and therefore if he give or sell the goods, the subsequent Administrator cannot avoid it.

If a man dye Intestate and have not *bona notabilia*, and the

35. Where an Administration once committed by the Ordinary may be afterwards revoked; and what shall be said a revocation of such an Administration, or not, and what acts done before shall stand in force or not.

4 H. 7. 14.
lit. Bro.
Sec. 130.
34 H. 6. 14.
Dier 339.
Bro. Administrat. 7.

See the
Stat. 21 H.
8. ca. 5.
Co. 6. 18.
New book
of Extr. 38

Mow. 281.
Co. 6. 18. 19
Dier 339.

Co. 6. 19.

Co. 6. 135.

Bishop

Bishop of the Diocess grant Letters of Administration to one, and after the Archbishop doth grant Letters of Administration to another; in this case the effect of the first Administration is suspended until the other be repealed and declared by sentence to be void. If there be a Will, and it is concealed, and thereupon an Administration is granted, and after the Will is produced and proved, in this case, the Administration is *ipso facto* determined, and all the acts the Administrator hath done *ab initio*, are become void. See more in the next Question. Plow. 28.
9 H. 5. 5.

35. What acts done by one Executor or Administrator may be avoided by the subsequent Executor or Administrator, and what not.

If a Will be made by an Ideot, and an Executor appointed therein, and the Executor take upon him the Administration, and after the Will is avoided for the weakness of the Testator, in this case, it seems that all the acts the Executor doth before the avoidance of the Will are good, and not to be avoided by the Administrator. Dier.

If there be a Will made, and an Executor appointed, and the Ordinary cite the Executor to come in and prove the Will, and he doth not come, and thereupon the Ordinary doth grant the administration to another; in this case, all acts done by the Administrator are good, and shall binde the Executor, if he may and shall afterwards take upon him the Executorship. But otherwise it is where the Ordinary doth grant the Administration before the Executor be cited to appear, or before the time given him to take upon him the Administration; for in this case nothing that he doth shall binde the Executor. 3 H. 7. 14.

When there is an Administration granted, and it is afterwards upon a Suit by condition onely repealed; in this case all acts done by the first Administrator are good and shall binde the subsequent Administrator. But in case where the first Administration is upon a Suit by appeal by sentence annihilated and declared void, there all acts done by the first Administrator are void, and shall not binde the subsequent Administrator: And therefore if the Ordinary of the Diocess grant an Administration that doth belong to the Metropolitan to grant (in which case the Administration is void) all acts done by the Administrator are void, and may be avoided by the succeeding Administration. But when the Administration doth belong to the Ordinary of the Diocess to grant, and the Metropolitan doth grant it (in which case it is onely violable) in that case, all acts upon and by vertue of the first Administration before the second Administration is granted, are good. Co. 62. b.
Plow. 28.
Co. 8. 14. b.
135.

If an Administration be granted to a stranger, and afterwards it is revoked and granted to the next of kin; in this case, all lawful acts done by the first Administrator before, and hanging the Suit, are good and unavoidable by the subsequent Administrator; and yet perhaps if the first Administrator waste the goods, it may be he may Willson
versus
Packman.
M. 37. 28
Eliz. 3. R.

may be charged for this by the subsequent Administrator, or by a Creditor.

Plew. 281.
282.
Co. 6. 89.
94 H. 6. 14 Where the Executor by the Will is not to administer untill a certain time; in this case, the administration of the goods is to be granted until that time, and all acts done by such an Administrator before that time are good and shall binde the Executor. So where an Executor is made, or an administration is granted upon condition, which is after broken, so that the executorthip or administration is determined; yet in this case, all acts done by him before this time are good.

4 H. 7. 23.
Plew. 282. If there be a false and a true Will, and the Executor of the false Will prove the Will first, and afterwards the Executor of the true Will doth disprove and avoid the first Will, in this case, he may also avoid all acts the first Executor doth.

Co. 6. 13.
Dier 30. 80.
Co. 6. 132.
334.
21 H. 5. 39.
Dier 2.
27 H. 8. 6.
Co. 9. 108.
1 H. 4. 21. The same Bars and Pleas regularly, that a man may have to actions brought by the deceased himself in his life, a man may have to bar the Action and Suit of his Executor or Administrator after his death. But an Executor or administrator may have besides the same Pleas and Bars to Actions the deceased might have had, as *Non est factum*, *Per Duresse*, *Non Assumpsit* and the like, divers other Pleas and Bars to Actions in respect of his Estate and condition as Executor or Administrator: For if he never meddle with the goods and chattels of the deceased, and yet be sued as Executor or Administrator, he may plead *Neminus*, i. e. he did never intermeddle as Executor or Administrator; and if this be found for him, this will bar the Plaintiff: And if he do intermeddle and take upon him the administration, he may plead, if the case be so, that he cannot recover the goods of the deceased; for he shall be charged for no more then what he can get in his possession. Or he may plead that he hath fully administered all the Goods and Chattels of the deceased, and hath nothing left to administer; or he may plead, that he hath paid so much of his own money as the goods in his hands do amount unto. Or if he be sued for debts due by Obligations or such like Especialties entred into by the deceased, he may plead that there are debts due, and yet to pay on Judgements had against the deceased, or that there are debts due and yet to pay on Recognizances or Statutes entred into by the deceased, and that he hath no more then enough to satisfie them: Or, he may plead that there are Judgements had against him for other debts of the deceased in equal degree with the debt sued for, and that he has no more then enough to discharge them: so as these former debts, on, and for which these Judgements were had, and Statutes given, be *bona fide* due, and the Judgements, Recognizances and Statutes in truth continued for the same; for if there be any fraud in the case, viz. that either the Judgements, Recognizances, or Statutes, were

37. What shall be said a good bar in debt, or other Action brought by, or against an Executor or Administrator, and what not.

at

at first entred into, or are afterwards continued of purpose to deceive or delay others of their due debts, when either the debt is satisfied, or compounded for less, or the like, in these cases this Plea will not serve; but this matter being disclosed, by the Plaintiffs pleading, he will avoid it: And if he be sued for a debt due upon a simple Contract or Promise of the Testator, he may plead there are debts to pay, due by Obligations and other especialties entred into by the deceased, and that he hath no more then enough to satisfie those debts, and this will bar the Plaintiff in his Action: and therefore if an Executor or Administrator plead a Judgement in bar of an action of Debt upon an Obligation, he must shew also that the Suit whereupon the Judgment was had, was upon an Obligation; for if it were on a simple Contract, it is no bar. And if the Executor be sued for debt on an Obligation, he may plead he made voluntary payment of other Debts due upon Obligations, or gave new security for them in his own name before the Suit began, and that he hath no more then enough to satisfie them. But to plead such a voluntary payment, or giving of new security after Suits begun upon this Obligation now in Suit, is no good plea. If an Action be brought against an Executor or Administrator on an Especialty for money, it is no good plea for bar of this Action to plead a Statute or Recognizance with Defeasance to perform Covenants when there is no Covenant broken. If a Suit be against an Executor or Administrator for a Legacy, it seems it is no good plea to plead a Bond with Condition for performance of Covenants, or for the doing of any other collateral thing that is contingent onely, and not yet broken. It is no good plea in an action for an Executor or Administrator to say, that the deceased was outlawed.

Curia Tr.
37 Eliz.

Trin 39.
Eliz. B.R.

38. Where and in what case, an Executor or Administrator shall be charged by his own act or pleading upon his own goods; and where execution shall be *de bonis propriis*, and where not.

An Executor or Administrator may make himself chargeable of his own goods, either by omission, as when he being sued upon an Obligation, or the like, and there is a Judgement against him or the deceased in force, and he hath but enough to satisfie that Judgement, and he doth not plead this in bar of the present action, but doth suffer the Plaintiff to recover against him; in this case he must satisfie this second Debt out of his own estate: Or by Commission, and that either by doing, as when he doth any act that is a waste in him, and thereupon a *Devastavit* is returned against him, for in this case he must answer so much as he hath wasted out of his own estate: Or by saying, as when a Suit is against, and he doth plead such a false plea therein as doth tend to the perpetual bar of the Plaintiff in the action, and yet it is of a thing that doth lie within his perfect knowledge, as when he doth plead he is not Executor, nor did ever administer as Executor, and upon trial of this issue against him it be found he is a

3 H. 6. 12.
Dier 185.
So. Co. 9.
90. 94.
9 H. 6. 574
34 H. 6. 540
Bro. exec.
241. 105.
Lit. Bro.
sect. 29.
Kelw. 61.
Bro. executor 164

rightful

rightful or wrongful Executor; in this case he must satisfy this Debt out of his own estate whether he have Assets or not, and the execution had upon the Judgement had in this Suit shall be *de bonis propriis*. And if an Executor or Administrator be sued, and he plead to the Action *plene administravit*, and upon trial it is found against him; in this case if he have any of the goods of the deceased left in his hand, the execution shall be of them; but if he have none of the goods of the deceased left, the execution shall be, and he shall be charged for so much as is found to be in in his hands *de bonis propriis*. But where he is sued upon a promise made by the Testator, and he plead *non assumpsit* to it; and where he is sued upon a Deed made by the Testator, and he plead *non est factum* to it, or the like, and these issues upon trial are found against him; or when he shall confess the action, or suffer a Judgement to go by default against him: or plead any vain plea, in all these cases he shall not be chargeable of his own estate, neither shall the Judgement and Execution in these cases be *de bonis propriis*, but *de bonis Testatoris* onely for the Debt, and *de bonis propriis* for the costs; and yet if an Executor or Administrator shall entreat a Creditor to forbear his Debt until a day, and then promise to pay him, by this promise he hath made himself chargeable as for his own debt, howbeit it shall be allowed him upon his account. But in all these cases, and such like, where a man shall be charged of his own estate, and the execution shall be *de bonis propriis*, it seems the Judgement is always *de bonis Testatoris*, and the course is this: The first execution is against the Executor *de bonis Testatoris*; and not *de bonis propriis*; and after a *Devastavit* returned by the Sheriff against the Executor or Administrator, and not before, a new execution is directed to the Sheriff to levy the debt *de bonis Testatoris*; and if there be none of them to be found in his hands, then to levy them *de bonis propriis*. And therefore if an Executor or Administrator be sued by a Creditor, and the Executor or Administrator plead a *plene administravit* generally, or plead specially that he hath no more but to satisfy a Judgement, or the like; and upon trial this issue is found against him, and it is found he hath in all or part enough to satisfy the Debt; in these cases the Judgement is *de bonis Testatoris*, and thereupon an Execution is (as in other cases) to levy the debt *de bonis Testatoris* in the hands of the Executor or Administrator; and for the costs *de bonis propriis*. And upon the return of the Sheriff, a special execution doth issue forth to levy the money *de bonis Testatoris*; *Ex si constare poteris* that he hath wasted the goods then that he shall make the execution *de bonis propriis*. And hereupon also the Plaintiff may if he will have a *Capias* against the Body, or an *Elegit* against the Lands of the Executor or Administrator.

Arworth
case, M.C.
28, 39 El.

32 H. 6. 45.
46 Ed. 3. 9.
Fitz. Exe-
cutors 9.
Co. 5. 32.
B. 134.
Dier 183.
32.

strator, and no other course of proceeding can or may be had against the Executor or Administrator in this case.

An Action of Debt was brought against two Executors, and one of them did appear and confess the action, and the other made default, and thereupon Judgement was given to recover against them both *de bonis Testatoris* in their hands, and execution accordingly, and upon this execution the Sheriff did return a *Droghavit* against the Executor that made default only, and hereupon a *Scire facias* went out against him alone, and afterwards an execution against him alone *de bonis propriis*.

Assets, Quid.

Assets in this case is said to be where one dieth indebted and maketh his Executor, or dieth intestate, and the Executor or Administrator hath sufficient in goods or chattels or other profits to pay the debts or some part thereof, this is said Assets in his hands, and for so much he shall be charged.

Terms of
the Law
Co Super
Lit. 374

39. What shall be said to be Assets in the hands of an Executor or Administrator to charge him, or not.

All those Goods and Chattels, Actions and Commodities which were the deceaseds in right of action or possession as his own, and so continued to the time of his death, and which after his death the Executor or Administrator doth get into his hands as duely belonging to him in the right of the Executorship and Administration, and all such things as do come to the Executor and Administrator in lieu or by reason of thar, and nothing else shall be said to be Assets in the hands of the Executor or Administrator to make him chargeable to a Creditor or Legatee. And herein these things are to be known; 1. That Assets in the hands of one of the Executors shall be said to be Assets in the hands of all the Executors. 2. That Assets in any part of the world shall be said to be Assets in every part of the world: and therefore if that point be in issue, and it appear that there is Assets in the hands of any one of the Executors, or in any County or place whatsoever, the Jury must finde that there is Assets. 3. All goods and chattels of what nature or kinde whatsoever that are valuable, as Oxen, Kine, Corn, &c. shall be esteemed Assets. But such things as are not valuable, as a Presentation to a Church and the like, shall not be accounted Assets. 4. All the goods and chattels that come to the Executor or Administrator in the right of their Executorship or Administration, and that are by Law given to them by vertue thereof in the right of the deceased (for which, see before at *Numb. 25.*) and which are in possession shall be esteemed Assets in his hands. And therefore if a Feoffment be made to the use of the Feoffor for life, and after to the use of his Executors and Assigns for twenty years; in this case it seems this twenty years shall be said to be assets in the hands of the Executor of the Feoffor. And goods pledged to the deceased and not redeemed, or the money wherewith it is redeemed, when it is redeemed, shall be said to be Assets in the hands of the

Kelw. 31.

Co. 6. 49.

Co. Super
Lit. 388.

Co. Super
Lit. 388.
5-34.

Dier 96a.
Kelw. 6a.

Co. Super
Lit. 54.
Dier 96b.

30 H. 7. 4.
Bro. assets
12.

Executor

See before
Humb.

Co. Super
Lit. 134. 5.
11. Bro.
Affix 24.
Dyer 262.
121. 6 H.
4. 81. Co.
6. 58. Kellw
61. Dyer
362.

Curia Mil.
13. 2. R.

Co. 1. 90.
Flow. 84.
232.

Co. 5. 34.

Co. 1. 87.
Bro. Leases
69.

Trin. 7. Jas
B. R. Si-
mons case.
Co. 8. 136.

Executor or Administrator. And if the deceased doth appoint that the Executors shall sell his land to pay his debts, the money that is made of the land when it is sold, shall be said to be assets in his hands. 5. All the goods and Chattels in action or in possibility at the time of the death of the deceased that are afterwards recovered, and are gotten in possession into the hands of the executor or Administrator, when they are so recovered, are esteemed assets in his hands. But they are never accounted assets until they are recovered and come in possession; and therefore if there be debts owing to the deceased upon Statutes or Obligations, or otherwise, these are never esteemed assets in the hands of the Executor or Administrator until he hath recovered them. So likewise if there be debt or damages recovered by a judgment had by the deceased, but no execution is done until execution be made this shall not be esteemed assets in the hands of the Executor or Administrator. So if the Executor bring an action of trespass against another *de bonis asportatis in vita Testatoris*, and he have a Judgement for damages; in this case until he hath recovered it by execution, it shall not be esteemed assets in his hands. And if the Judgement be erroneous, and the execution avoidable; in this case albeit it be recovered and gotten in possession, yet it shall not be esteemed assets. And therefore if one sue another and recover against him as Administrator of *1 s*; and after a Testament made by *1 s* is produced and proved, and thereby an Executor is made; in this case the money recovered by the Administrator shall not be said to be assets in his hands as to any of the Creditors, because the executor may recover it from him, or the Debtor will have it again. And if the executor or Administrator do never recover and get the thing into his possession, he shall never be charged, especially there where he hath done his best to get it and cannot. If one covenant to make a Lease for years to the deceased, his executors or Administrators, and after his death the Lease is made to the executor or Administrator accordingly; in this case this Lease shall be said to be assets in his hands, and he shall be chargeable for so much to any Creditor. And whatsoever the executor or Administrator, must be forced to sue for by the name of executor or Administrator, being recovered, shall be esteemed assets in his hands. 6. Albeit the thing be extinct and gone as to the executor and Administrator himself, yet it may have his being and be accounted assets as to the Creditors and Legatees. And therefore if an executor or Administrator have a Lease for years of land in the right of the deceased, and afterwards he doth purchase the Fee Simple of the land (whereby the Lease is drowned) yet in this case this Lease shall continue to be assets as to the Creditors and Legatees still. * And if the Debtee make the

Debtor his executor, or the Debtee dye Intestate, and the administration is committed to the Debtor; in these cases this debt shall be said to continue, and shall be esteemed assets for so much as to other Creditors. And if a woman executrix have goods worth 20l. and she marry with one of the Creditors to whom 20l. is owing; in this case it seems the husband may not retain the goods to pay himself, but they shall be assets to other Creditors. And yet if the Debtor make the Debtee his executor, he may retain so much as to satisfy his own debt, and that he doth so retain shall not be said to be assets in his hands as to any other Creditor. And if *I S.* have goods to the value of 20l. and he is bound to *B* and *C* in 20l. a piece, and he dyeth intestate, and after *D* doth administer, and then *B* dyeth and maketh *D* his executor; in this case *D* may retain this to satisfy his own debt, and it shall not be said to be assets in his hands as to any other. 7. The goods and Chattels of other men in the hands of the executor or Administrator that were in the possession of the deceased, if he had no right to them, or if he had, and they do not belong to the executor, will not make the executor or Administrator chargeable; for these shall not be esteemed assets in his hands. And therefore if the goods of another man be amongst the goods of the deceased, and these come altogether into the hands of the executor or Administrator; these goods that are the goods of another shall not be said to be assets in the hands of the executor or Administrator. And if the executor doth receive a Rent that doth belong to the Heir; this rent shall not be said to be assets in his hands, and hence it is that if the deceased were Out-lawed at the time of his death, that his goods and Chattels are not to be accounted assets, for they are none of his. 8. If an executor of his own wrong to whom 20l. is owing, doth enter upon so much of the goods of the deceased as is worth 20l. intending to pay himself; this shall be esteemed assets in his hands to make him chargeable for so much to any Creditor or Legatee. 9. If the deceased have goods worth 20l. and owe 20l. to *A* and 10l. to *B*, and he compound with *A* for 10l.; in this case he shall be said to have assets, and be charged to pay the debt of *B* also. 10. If a man have a Lease for years worth 20l. *per annum* at the Rent of 5l., and he dye; in this case not the whole value of the land, but so much as is above the Rent shall be said to be assets in the hands of the executor or Administrator.

Burnets
case Hil. 27.
Jac. Flow.
184.

Kelw. 63.
Co. 6. 58.
Dyer 364.

Doct. 836
lib. 2. c. 36.

Co. 5. 10.
Dyer 24.

27 H. 8. 6.

Co. 5. 31.
10 H. 7. 5.

49. Probate.
Quid Quoru-
p. 23.

The probate of a Testament is the producing and insinuating of it before the Ecclesiastical Judge, Ordinary of the place where the party dyeth, or other that hath power to take the same. And this is done in two sorts, either in common Form, *i. e.* upon the oath of the executor or party exhibiting it upon his credulity that

Swinh. 161.
264.

that the Will exhibited is the last Will and Testament of the party deceased, which is the ordinary course; and this the Ordinary may accept if he will. Or *per testes*, i. e. which is when over and besides his oath he doth also produce witnesses, or maketh other proof to confirm the same, and that in the presence of such as may pretend any interest in the Goods of the deceased, or at the least in their absence after they have been lawfully summoned to see such Will proved if they think good. And this course is used onely where there is a suspicion of the Will, and the Caveat is entred, or where there is a fear of contention and strife between the kindred and friends of the party deceased about his Goods; for a Will proved in common form may be called into question at any time thirty years after; and when the Will is thus exhibited into the Bishops Court, the same is to be kept by his Officers, and the Copy thereof in Parchment under the Bishops Seal of his office to be certified and delivered, which parchment so sealed is called the Will proved.

The Probate of the Will (as having respect to the goods and chattels) is in some respect necessary; for howsoever as touching any Free-hold of lands devised it is not at all material, and howsoever the Executor before Probate may receive and release debts, and do most other acts as Executor, yet he cannot sue for any debt due to the Testator. And if the Executor delay the Probate, the Ordinary may by Process compel him to come in and accept or refuse of the executorship. And when it is proved it must be proved by the Executors or one of them at least; and if all the goods of the deceased be within the same Diocese wherein he lived and dyed, the Executor must prove it before the Ordinary of the Diocese, or before his lawful Commissary or Deputy, or before the Archdeacon or his Deputy or Commissary (as their composition is) or if the goods be in a Peculiar, then before him that is Judge of that Peculiar; or if the goods be within two Peculiars, then before the Ordinary of the Diocese, wherein these two Peculiars lye. But if there be *bona notabilia* in the case, viz. That the Testator have goods or chattels at the time of his death of the value of 5 l. or more l. - ing in two or more Counties, or have good debts upon Especialties (as some say) for otherwise they follow the person; or have any (Especialties as others say) lying in other Counties for debt, so that there be of goods and chattels or good debts to the value of 5 l. in any other Diocese then that wherein the Testator led his life and dyed, then the Probate doth belong to the Archbishop of that Diocese wherein it is, unless the Ordinary of the same Diocese have the Probate by composition between him and the Metropolitan; for otherwise there must be several

41. where the Probate of a Will is necessary, and where not; And by and before whom, And in what time it must be proved.

On. Super
Lit. 292.
Perk. Sec. 482.

Perk. Sec. 491. 462.
486. Co. 9.
46. Fitz.
Testament
4. 3. 5.
Flow. 180.
Stat.
15 H. 8. c. 9;
15 H. 8. c. 5.
See before
at Numb.
31.
Swin. part.
6. Sec. 11.

Probates for the goods in every Diocess (as anciently was used in these cases. But if a man die in his journey in another Diocess, and have more then 5 l. goods about him, this shall not be said to be *bona notabilia*, but the Will may be proved before the Ordinary of the place where the deceased lived and his estate doth lie. And except it be in cases where men have *bona notabilia*, the Officers of the Courts of the Metropolitans are not to cite men out of their own Diocess, and to discover this matter, it is the duty of the Ordinary of the Diocess, when any man comes to prove a Will, to give him an Oath, and examine him whether he know of, or do believe, there are any goods to the value of 5 l. lying in any other Diocess at the time of the Testators death, and if he hear of any to dismiss them to the Prerogative Court, and to give them notice of it: Also in some places the Lords of Manors have the Probate of all the Wills within their Manor by custom of the place; and in those places it must be proved there, and not elsewhere. And when an Executor is bound to prove the Will before the Ordinary as before, the Ordinary may give him what time to do it he doth think fit, and when he doth prove it, the Ordinary doth take an Oath of him to administer the goods faithfully, and to take bond of him also if he please; but this some do omit.

Stat 21 H1
8. cap. 3Fitz. Test
meat + 3

And now because lands are oftentimes conveyed by the several kinds of assurance aforesaid unto one man, but to the use of another, and to the intent that another shall take the profits of it, we must of necessity hear somewhat of the learning of Uses, and then we shall have done.

CHAP.

CHAP. XXIV.

Of a Use.

Co. 1. 121.
122.
See the Ad-
dition to
Just. Dod.
Treatise.
Co. super
Lit. 171.
172.

A Use is the profit or benefit of Lands or Tenements, or as o-
thers define it, The equity and honesty to hold the Land in *con-*
scientia boni viri : Or, as others define it more fully ; It is a trust or
confidence reposed in some other which is not issuing out of the Land,
but as a thing Collateral annexed in privy to the estate of the Land,
and to the person touching the Land, so that he for whom he is trust-
ed shall take the profit of the Land and the Terre-Tenant shall dis-
pose of it according to his direction : As for an example, If a Feo-
ffment be made to *I S* and his heirs, to the use, profit or behoof of
W S and his heirs ; in this case heretofore *I S* had the estate and
property of the Land, but *W S* had and was to have the profits in
honesty and equity. So if one agree with *W S* for a piece of Land
for 20 l. and pay him the money, but hath no assurance of the Land,
yet the equity and honesty to have this Land is in him, that hath con-
tracted and paid his money for it ; and this trust was called the use of
the Land ; and hence came the course in conveyances to set down in
the *Habendum* to whose use, as *Habendum* to *A* and his heirs to the
use of *A* and his heirs : And he for whom this trust is, and that
ought to have the profit of the Land by conveyance as aforesaid is
called *cestuy que use*. There is a use also of Goods and Chattels, which
is properly called a Trust or confidence, for one may have such things
to the use of another.

1. Use. *Quid.*

Cestuy que use.
Trust or con-
fidence. *Quid.*
2. *Quorumplex.*

Dod. & St.
95. Perk.
Sect. 511.
Co. 2. 58. 9.
11. Dyer
18. 146.

A Use is either express ; i. e. when the use or intent is openly de-
clared and expressed between the parties upon the making of the
estate of Land, whereunto the use is annexed, as when a Feoffment
is made of Land to *I S* and his heirs, to the use of *W S*, and the
heirs of, or heirs males of the body of the said *W S*, or to the
end and intent that *W S* and his heirs, or *W S* and the heirs of his
body shall take the profits of it, or the like ; or when I covenant to
stand seized of the Land to the use of my wife for life, and after
of my eldest son, and the heirs of his body, or the like. Or, it is
implied, i. e. when the use is not declared upon the agreement be-
tween the parties, but is left to the construction and made by the
operation of Law, as when a man seized of Land makes a Feoffment
in Fee, or doth levy a Fine, or suffer a Common Recovery of it to
another without any consideration, and it is not agreed nor declared
to what use or intent it shall be ; this by construction of Law shall
be to the use of the Feoffor, Conusor, or Recoverer : But if there be
any consideration of money or other thing paid or given, or any rent

or Tenure reserved, then by construction of Law, it shall be to the use of the Feoffee, ~~Compter, or Receiver~~, for otherwise the Law presumeth that the intent of him that did part with the Land was so (*viz.*) and the other should have the property of the Land to his use, and that he himself should take the profits of it. So when one doth bargain and sell his Land for money to another, and no use is expressed; in this case the Law doth say, it shall be to the use of the Bargaine and his heirs. A use also is either in *esse*, and that in possession, reversion, or remainder, as when a Feoffment is made to *I S.* to the use of *I W.* and his heirs, or to the use of *I W.* and after to the use of *I D.* and the heirs males of his body, and after to the use of *S T.* and his heirs for ever: Or it is in *posse*, or in contingency, as when by possibility, it may happen to be in possession, reversion or remainder, as where a use is limited to me for life, and after to him that shall be my first son in Tail, this is onely the possibility of a use, for it may or may not be.

Co. 1. 222.

3. The nature,
incidents, and
original of in

A Use at the Common-Law, before the Statute hereafter spoken of was made, was, and where that Statute doth not take place, is nothing but a meer confidence and trust Colateral to, and distinct from the Land annexed in privity of estate, and to the person touching the Land to this purpose, that *cestuy que use* should take the profit of the Land, and the Feoffee or Terre-Tenant that was trusted should make estates, and otherwise dispose of the Land as the *cestuy que use* in his life, or at his death by his last Will and Testament should direct and appoint; and if he made no disposition, then that it should go to his heir, so that the Feoffee had the Free-hold or sole property of the thing in him, and *cestuy que use*, had neither *jus in re* nor *jus ad rem* (for if he against the Will of the Feoffee had entred into the Land, he had been a Trespassor) but a bare confidence or trust for which the *cestuy que use* had no remedy, but in Chancery upon breach of the trust, and there to have the Feoffee imprisoned untill he perform the trust according to the order of the Court. And these uses to some purposes, were reputed in Law as Chattels, and therefore were devisable by Will, and to some purpose as Hereditaments, and a kinde of Inheritance of which there was a *possessio fratris*, &c. and to some purposes, neither Chattels nor Hereditaments, for they were not esteemed Assets in the Heir or Executor, neither were they reputed as Commons, Rents, Conditions, and such like Inheritances which are discontinued or taken away by the Alienation of the Terre-tenant, Elcheare, Disseisin, &c. but a use is not so.

Co. in
Chudleigh
case in to-
ro & Shel-
leys case.
Kelw. 160.
Dyer 12.
Bro. Frof.
all uses in
toto con-
fidence, 25

Incidents of it.

And to every of these uses, there were two inseparable Incidents, confidence in the person, and privity in the estate, expressed by the parties or implied by the Law, and when either of these failed the use was either gone for ever or suspended for a time at the least:

least: And therefore if the Feoffee to use, upon good consideration had Enfeoffed another of the Land that had not notice of the use, the use had been gone for ever, because howsoever here was a privity of estate, yet here was no confidence in the person, but if the Feoffment had been without consideration to such a one; in this case, the use had remained still because the Law did imply a notice: So also it seems the Law was when it was made in consideration of marriage only. And if a Disseisor, Abator, or Intruder, had come to the possession of the Land, whereof the use was, albeit he had notice of the use, yet the use was suspended during their Possession, and they should not have been seized to use as the Feoffee was, for they come not to the Land in the *present* but in the *past*. And if a Lord by Escheat, Lord of a Villain, or one that had entred for Mortmain, or that had recovered in a *Cessavit*, &c. had come to such Land and had notice of the use, the use had been gone for ever, for these came to the Land in the *past* and above the use: And Tenant in Dower, and by the courtesie should not be seized to uses in being, for all these wanted privity of Estate: And if there had been Tenant for life, the remainder in Fee to the use of another, and the tenant for life had made a Feoffment in Fee to one that had notice of the uses this second Feoffee should not have stood seized to the first uses: So, if the husband had made a Feoffment in Fee of the Land of his wife upon consideration and without any use expressed, the wife should not have had a *Subpoena* because the Feoffee was not in privity of Estate of the wife: And if *cestuy que use* for life or in Tail, the remainder in Tail with divers remainders over in use, had made a Feoffment to one that had notice, he should not have been seized to the first uses *causa qua supra*. But otherwise it is of Commons, Advowsons, and such like Appendants or Appurtenants, for if Tenant in Tail, or Husband in right of his Wife make a Feoffment of a Manor, or of part of it with an Advowson Appendant, the Advowson at least after Presentment shall pass as Appendant to the Manor or to part of the Manor, and not to the estate of the Land which is discontinued by the Feoffment. So if a Disseisor, Abator, Intruder, or the Lord by Escheat, or the like, shall have these things as annexed to the Land or the Possession of the Land, so that there is a difference between a use, a warranty, and such like things that are annexed to the estate of the Land in privity, and Commons, Advowsons, and other Hereditaments that are annexed to the possession of the Land.

And these Uses began first when the custom of property began and was brought in, that one man knew his own from another mans, and then was to enjoy his own and not to be deprived of it without consent or order of Law; for then he that had Land, had two things in him, a Possession of the Land, and power to take the profits of it, and those being to be distinguished, he might give the

The Original of it, and why so much lands were put in use.

Free-hold or Possession to another, and take the profits himself; and they were the rather allowed by the Law for a time as reasonable, because they gave a man power to dispose of his Land by Will, which otherwise he could not have done but in some special cases by custom of the place: but in time this use was turned into an abuse, and the greatest part of all the Lands in the Kingdom; especially in the time of the broyl between the houses of York and Lancaster, were put in use, partly of fraud and partly of fear, which produced not a few inconveniencies, for thereby many were deceived

The mischief
of uses.

Of their just and reasonable Rights; as namely, a man that had cause to sue for his Land, knew not against whom to bring his Action, or who was owner of it; The wife was defrauded of her thirds, The husband of being Tenant by the curtesie, The Lord of his Wardship, Relief, Harriot, and Escheat, The Creditor of his Extent for debt, The poor Tenant of his Lease, and other Purchasers of their purchase, for these Rights and Duties were given by the Law from him that was owner of the Land and none other, which at this time was the Feoffee of trust, and so the Feoffor the old owner of the Land, should take the profits, and leave the power to dispose of the Land, at his discretion to the Feoffee, and yet the Feoffee was not such a Tenant of the Land, as his wife might have Dower, or the Land be extended for his debt, or that he might forfeit it for Felony or Treason, or that his Heir should be in Ward for it, or any duty of Tenure fall to the Lord by his death, or that he could make any Estates of it; also Lands were many times conveyed by last wills, by word only and sometimes by tokens onely in time of great extremity of weakness and many perjuries for tryal of secret uses were daily committed.

Lives and pos-
sessions uni-
ted.

All which having been espyed, have been labored to be cured and holpen by divers particular Acts of Parliament in all succeeding ages: but the makers of these Laws finding the continuances of these uses so mischievous, that they did over-reach the policy of all Laws, for a general remedy, and a perfect cure of all the said mischiefs and abuses, have at last provided; That where any are, or shall be seized of any Lands to the use or trust of any other, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, or otherwise, by any means whatsoever *cestuy que use* or trust; that hath any such use in Fee-simple for term of life or years, or otherwise, or any use in Reversion or Remainder, &c. shall have the possession of the Land in such quality, maner and condition as he had the use or trust: And where any one is seized of Lands to the use or intent that another shall have a yearly rent out of the same Lands *cestuy que use* of the rent, shall be deemed in possession thereof of like estate as he had the use: By which Statute the use and possession of Land is now at this day coupled, conjoynd and married with an indissoluble knot, so as they cannot now stand apart and divided, but her that hath

Stat. 1 R.
2. C. 9.
4 H. 4. c. 9.
11 H. 6. c. 1.
4 R. 3. c. 1.
4 H. 7. c. 1.
17.
1 H. 7. c. 1.
19 H. 7. c. 15.
27 H. 8. c. 10.

the

the one must have the other, and the one doth ensue the other as the shadow doth the body; and therefore now upon Fines, Recoveries, and Feoffments, the estate doth settle as the use and intent of the parties is declared by word or writing before the act done, as for example, If a writing be made between two or more, that one of them shall levy a Fine, make a Feoffment, or suffer a Recovery to the other to the use and intent that one of them; or another man shall have it for life, and after another in Tail, and after a third in Fee-simple; in this case, the Law setteth the estate according to the use and intent declared, so that now what estate a man hath in the use the same he hath in the possession. But herein for the more full understanding of this Statute, and the Law at this day, it must be observed, That this Statute doth not extend to all manner of uses, neither are all uses executed and united to the Possession hereby; for to every Execution of a use within this Statute, four things are requisite: 1. That there be a person seized: 2. That there be a *cestuy que use in esse*. 3. That there be a use in *esse*, in Possession, Reversion, or Remainder. 4. That the estate out of which the uses do arise be vested in *cestuy que use*, so that when these four, *viz.* Seisin in the Feoffees, *cestuy que use in rerum natura*, use in *esse* and that the estate of the Feoffees doth vest in *cestuy que use*, then there is an Execution of the use within this Statute; but if any of these fail, there is no execution of the use within this Statute: And therefore it is agreed that this Statute doth not execute any use, but onely uses in *esse*, so that the right of a present and a future or contingent use are excluded until they come in *esse*, and then the Statute doth execute them; also if no alteration be of the estate of the Land before. And if *cestuy que use* in Tail with divers uses in remainder had made a Feoffment and dyed before the Statute, no Execution should have been of this right of a use until Entry by the Feoffees. So if *cestuy que use* in possession had made a Feoffment before the Statute, no right of the use in possession or remainder shall be executed by the Statute untill the Regress by the Feoffees: So if a Feoffment had been made before the Statute to the use of the Feoffee for life, and after to the uses of others in remainder, and the Feoffee had made a Feoffment in Fee to another, this use shall not be recontinued, or the repossession of the Land executed unto it by this Statute; so that the right of uses in *esse* and uses in contingency untill they happen to be in *esse* remain at the Common Law, as they were before the Statute: and therefore if the estate of the Feoffees be in such cases devested by disseisin; or the King, or a Corporation, or an Alien, or a person Attaint, &c. be enfeoffed of the Land before the use come in *esse*, or if the Land be aliened *bonâ fide* upon consideration to one that hath not notice of the use; this use can never be executed untill these possessions be removed by lawfull entry or

To what uses
the Statute of
27 H. 8. doth
extend, and
to what not.

Co. l. 136.
136. Plow.
391.

Co. l. 126.
Dyer 58.
88. 330.

Action.

action of the Feoffees; and if their Entry and action be barred, the use is gone for ever, and the party grieved thereby hath no remedy but in Chancery: And therefore if *estui que est* in Tail, the remainder in Tail, restrained with a clause of perpetuity be dissolved; no use in Contingency can be executed by this Statute. And if before the Statute, a Feoffment had been made in Fee to the use of I S for life, and after to the use of the right heirs of I N, and the Feoffees had been disseized, and then the Statute had been made, and after I N dye, and after his death I S dyes, this use shall never be executed in the right heir of I N. And so also if a disseisin be after the Statute and before the death of I N; no Possession shall be executed in the right heir of I N; Also uses that need no Execution by the Statute, as when a man doth convey Land to I S and his heirs to the use of I S and his heirs; this doth not need help of this Statute: Also uses that are against the rules of the Common Law, shall not be executed by this Statute: And therefore if a Feoffment be made to the use of A for life, and after to the use of every person that shall be his heir one after another for term of his life: So if one make a Feoffment to the use of another in Tail, with divers remainders over, with a Proviso that neither of them shall discontinue or alien, &c. these uses shall not be executed, because these Limitations are wholly void; and in these cases it seems there is no remedy to be had in Chancery against the Feoffees: So that out of all this appeareth that some uses are executed presently, as uses in *esse*, and some are executed by matter *ex post facto*; if they be according to Law, and come in *esse* in due time; but if they be uses invented and limited in a new maner, and not according to the ancient Common Law, they are altogether void, and extinguished and abolished by this Statute: And where lands are conveyed to others in trust after this or the like manner, *viz.* that the Feoffees shall take the profits, and deliver them to the Feoffor and his heirs, &c. or that the Feoffees shall convey it to the heir of the Feoffor at his age of twenty one years: And where Lands are conveyed to certain uses expressed and declared and there be other secret uses and intents agreed upon between the parties; these uses or trusts are not within this Statute, neither will the Statute execute them, but they remain as they were before the Statute, determinable in Chancery: Also Leases for years of Lands in use that have their being before, and are granted over in use are not executed by this Statute: And therefore if a Lessee for years of Land, grant or assign over his estate to A and B and their assigns to the use of the Grantor and his wife for the term of their Lives; this use or trust is out of the Statute, and not executed thereby; and therefore in this case all the estate is in A and B, and the Grantor hath nothing but a use, for which he hath his remedy in Chancery: So if

Co. l. 138.

2 Gr. 457.
Dyer 369.
354.
Groomp.
Jur. 65.

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one be seized of Land in Fee, and he bargain and sell it, or make a Lease of it to another in trust, and for the benefit of a third person; this is but a Chancery trust, &c. in this third person, as was held clearly: *M. 8. Car. B. R.* And yet if a Feoffment be made to the use of *A*, and his assigns for the term of twenty years; this term of years shall be executed by the Statute: And so in all such like cases and questions of Trusts and uses that are not within the Statute of uses, the Law is now as it was before the same Statute was made, and all those matters are determinable in Chancery; for as the questions of uses and trusts that are within the Statute are to be decided and ruled by the Judges of the Common-Law, so are all other questions of uses and trusts that are out of the Statute to be ruled and decided by the Judges of the Chancery.

To make a good use, or to make a use to rise, especially such a use as may be within the Statute, respect must be had to divers things. 1. To the ways or means of creating and raising of uses, wherein is to be observed, that albeit the quality of the uses be changed in most cases by the Statute of uses, yet uses, and uses within this Statute are, and may be raised as they might before the Statute, either by transmutation of the estate, as by Fine, Feoffment, Common Recovery, &c. or out of the estate of the owner of the Land, as by bargain and sale, by Deed Indented and Inrolled, or by Covenant to stand seized to uses upon good consideration: And therefore a Fine, Feoffment, or Recovery may be had of Land to the use and intent, that either of the parties thereunto or others shall have it for any time or estate; and by this means what uses and consequently what estates a man will may be raised and created: And in these cases the Conusor, Feoffor, or Recoverer may appoint the use of the same Fine, Feoffment, or Recovery to whom he will, without any respect of marriage, money, kindred or the like; for in this case his will guideth the equity of the estate. Or if a man make a Lease to *A* for life to the use of *B* for life, this is a good use and estate in *B* during the life of *A*. Or if a man by bargain and sale for good consideration sell his Land to another; hereby the use will rise according to the estate bargained and sold unto the Bargainee; but in this case if it be an estate of Freehold, as of Fee-simple, Fee-tail, or for life, that is sold; the bargain and sale must be made by Deed Indented and Inrolled within six moneths after in some of the Courts at *Westminster*, or in the Sessions Rolls of the Shire where the Land lyeth, (except it be in Cities and Corporate Towns where they use to Inroll Deeds) otherwise no use will rise by it: but if it be an estate or term for years only that is sold, there the use will rise well enough without any such matter. Or if a man seized of Land in Fee, covenant to stand seized of it to the use of his wife, children, brethren, or other kinsfolks for

4. What shall be said a good use of land, or not; and when and where such a use shall be raised, altered or created, or not. First in respect of the manner of raising it, and the several ways whereby uses may be raised.

Co. super.
Lit. 271.
Plow. 301.

Dyer 186.

Co. 6. 68.

Dyer 153.
Co. 2. 36.
7. 40. 8.
23. 4. 17.
See Bargain and Sale.

Co. 2. 35.
8. 94.

life;

life, in Fee-simple, Fee-tail; or if one seized of Land in Fee-simple covenant to stand seized of it to the use of a woman he is to marry; or to the use of a woman his son or other kinsman is to marry; or the like; hereby the uses and consequently the estates will rise accordingly. And in these cases there is no need it should be by Deed Indented, &c. or that the Deed be Inrolled; for uses may be raised by Deed Poll as well as by Deed Indented. Also uses may be created (as some hold) by word or Parol-agreement as well as by Deed or Writing; for it is said it hath been adjudged, That if a man say to his son and a wife that his son is to marry, that in consideration of the same marriage they shall have the Land to them two in Tail; that hereby a good estate Tail will arise after the marriage; And that where one doth by Word without Deed grant to his son and to his wife in Tail Land in consideration of their marriage, that it was agreed by all the Judges that the use did rise upon this Agreement. Howsoever it is most safe in these cases to do it by Deed and in writing, for *Dyer* 206. *Plow*, 22. seems to oppugn this. And if a man make a Feoffment, levy a Fine, or suffer a recovery to the use of his last Will, or to the intent to perform his last Will, or to the use of such person and persons, and of such estate and estates as he shall limit by his last Will, and then afterwards by his last Will declare the uses, these are good uses, and this is a good way of raising of uses. So if a man devise his Land by Will to *TS* and his heirs to the use of *ID* and his heirs; it seems that the use will rise to *ID* and his heirs by this means. And if a man by a verbal Agreement in consideration of money or the like, sell his Land to another, or agree and promise that the Bargainee shall have it for any time, howsoever that hereby no use nor estate will arise (if it be a Free-hold that is sold) within the Statute, because it is not by Deed indented, &c. yet it seems a good use will arise at the Common-Law, and that the Bargainee shall have relief in Equity for his purchase. The second thing whereunto respect must be had, is to the persons trusted, or to him to whom the conveyance is made; for to every good use there must be a person seized to use, and he must be a person capable of such a Seisin. And for this it must be known that any sole person that may make an estate to himself may make an estate to other uses. Also a man may be seized of his own Land to other uses, as in the case of a covenant to stand seized to uses. But the King, or any Body Corporate, Alien born, or person attaint, cannot be seized to other uses no more by an Original Feoffment to use, then when they come by the Land in use at the second hand; in which case (as hath been shewed) neither such persons, nor disseisors, Abators, or intrudors, or Lords of Villains, or by Escheats, shall be seized to other uses;

Crompt.
Jur. 61. 60.
Plow 391.
308. and
the better
opinion of
the Judges
in Corbins
case 38
Eliz.

Lit. Sect.
462. 461.
Coo. 6. 17.

See the
Stat. 27. H.
8. of Uses
Fitz. De-
vise. 22.

Dyer 239.

Co 11. 23.
327. 335.
Plow 238.
Dyer 8.
283.

Resolved
in Doctor
Atkins
case. 44 Q.
Co. B.

Conscience.

Secondly, in respect of the persons trusted, and what persons may not be seized to the use of another, but to their own use.

uses; but in all these cases the uses are void, and the parties shall hold the land to their own uses, or to the uses of the Feoffors, &c. and not to the use of *Cestuy que use*. And a Bargainee of land for valuable consideration cannot be seized of the land to any other use but his own. The third thing to be respected is the *Cestuy que use*; for to every good use, as there must be a person seized to use, so there must be a person to whose use he is seized, and he must be capable also. And for this it must be observed that any man that is capable of an estate directly and immediately to himself, is capable of the same estate by way of use: but if the use be limited to a Corporation, there must be a licence had; otherwise it will be an alienation in Mortmain. And if future uses upon Contingencies be limited to such persons as are not in being, these uses howsoever they are good at the Common-Law, yet they are not good within the Statute, neither doth the Statute execute them at all until they come in possession. And if a Feoffment be made to *I S* and his heirs to the use of the Parishoners of *Dale*; this use is void, for they are incapable by this name; and it shall be to the use of the Feoffor. The fourth thing to be regarded, is the estate of him that doth raise the use in the land whereof the use is raised; for howsoever the Tenant in Fee-simple of land may create what uses he will in Fee, for life, or years upon it, and such uses are good; and the Tenants in tail, or for life may perhaps grant their land for their own lives to the use of a third person; Yet if a Tenant in tail for good considerations covenant to stand seized to the use of himself for life, and after of his eldest son in tail, no use will rise by this Covenant. So if Tenant in tail of an Advowson in gross grant it by Deed to one and his heirs to the use of himself for life, and after to the use of another in Fee; this grant is void by the death of the Tenant in tail. And if such a Tenant in tail bargain and sell his land by Deed indented and inrolled, hereby the Bargainee hath an estate descendible to his heirs but determinable upon the death of the Tenant in tail. And if one covenant by Indenture to stand seized to the use of *B* of White-acre which he hath not then, but he doth afterwards purchase it; by this no use will rise. And if one that hath but a term of years grant it to *I S* to the use of himself for life, &c. this is no good use within the Statute, but a Chancery trust onely. The fifth thing to be respected, is the estate of him that doth take by the conveyance out of which the uses are derived: for howsoever where a man doth grant in Fee-simple to another and his heirs, he may limit what uses he will upon this estate; and if a man make an estate for life to another, he may limit an use thereupon, yet if a man make a gift in tail to another, he can limit no use thereupon. And therefore if one grant his land to *I S*

Thirdly in respect of the persons for whom the trust is, or the *Cestuy que use*,

Fourthly in respect of the estate and possession of him that doth create the use,

Fifthly in respect of the estate and possession of him that doth take by the conveyance,

and

Dyer, 153.
Lit. Bro.
Secd. 60.
Co. 1. 136.

Mort.
main 37.

Beefore.

M. 7. 27
49 Ed. 3. 4.

Mill 98.
Eliz. Co. B.
Curia. Co.
2. 52.
Pasche 13.
Jac. Co. B.
Seignior
Say versus
Smith.
Co. 10. 96.

Silvertons
sale 37. 2.
B. R.

Dyer 169.
Co. 2. 78.

Co. Super
lit. 19.

and the heirs of his body to the use of I S and his heirs in Fee, this limitation of use is void, and I S hath hereby an estate in Tail. And if a Feoffment be made to I S to have and to hold unto him and the heirs of his body to the use of him his heirs and assigns for ever; this use is void. And where one doth bargain and sell land for money (in which case the law doth make an express use) no other use can be appointed. And therefore if A for money bargain and sell land to B and his heirs to the use of A for life and after of B in Tail, and after of A in Fee; all these uses are void for an use cannot rise out of a use. So if A make a Lease to B for years rendring Rent, To have and to hold to the use of the Lessor; this use is void as being against reason also. And if a Feoffee to use before the Statute of uses, had bargained and sold the land to one who had notice of the former use: no use had been made hereby; for there might not be two uses in being of the same land at one time. And if A enfeoff B to the use of C and his heirs, with proviso that if D pay to C 100l. that C and his heirs shall stand seiled to the use of D and his heirs, this last use is void; for the use must arise out of the estate of the Feoffee, and not out of the estate of the *Cestuy que use*. The sixth thing whereunto respect must be had, is the cause or consideration. For howsoever in cases where uses pass by the way of transmutation of possession, as by Fine, Feoffment, or Recovery, there the consideration is not at all material; for he that doth make the state, may appoint the use to whom he will without any respect to marriage, kindred, money, or other thing; for in this case his own will and consideration guideth the use and equity of the estate: yet in Bargaines an Sailes, and Covenants to stand seiled to uses, it is otherwise: for there consideration is so necessary that nothing will pass, neither will any use rise without a consideration, i. e. some matter that may be a cause or occasion meritorious which amounteth to a mutual recompence in Deed or in Law, which must be expressed or implied in the Deed whereby the use is created, or else supplied by averment and proof: For howsoever in this case an averment shall not be allowed and taken against a Deed, that there was no consideration given when there is an express consideration upon the Deed; yet when the deed expresseth no consideration, or saith [for divers good considerations] or the like, there an averment of a good consideration given shall be received, for this is an averment that may stand with the Deed; and without consideration Inrolment will not help. And therefore if one bargain and sell his land to another by Deed indented and inrolled without any consideration it seems no use will rise by this to the Bargain. So if one [for divers good causes and considerations, or for divers great and valuable consideration] bargain and sell his land to another, or covenant to stand seiled of his land to the use of another that is not of his

Sixthly in respect of the cause or consideration of it, and what shall be a sufficient consideration to raise or alter a use, Or
no.

Averment.

Trin. 74.
Jac. B. R.
Adjudged
Couper &
Franklin's
case.
Dyer 169.
Crompt.
Jur. 53.
Lit. 400.
sect. 284.

Dyer 255.
Coo. 136.
137.

Co. l. 176.

Dyer 169.
Crom. Jur.
62.

Dyer 146.
Co. l. 176.
11. 25.
Dyer 312.

41. Q. Ad
Judged.

his

Flow. 101.
Bro. Fals.
Incl. 9.
Doct. & St.
99. Crom.
Jur. 60. 61.
Dyer 90.

Crom. Jur.
61:

Bro. Ex-
position
of words
44

Flow. 302
22 H. 7. 20.

Dyer 374.

Co. 7. 11.
10. 143. 1.
23. Flow.
301. Lit.
Bro. & St.
284. Co. 1.
354.

his kinred; no use will rise by this, unless it be proved that money or something else was given for it. But if a man by Deed in consideration of money, as [in considerations of the sum of 100 l. to him paid, or in consideration of a competent sum of money to him paid or otherwise promised to be paid, or in consideration of other land, or of giving of counsel, or the like] bargain and sell, or by such like words grant his land to another in Fee-simple, Fee-tail, for life, or years; in these cases the use will arise to the bargain well enough. And therefore if I covenant with B that when he doth infeoffe me of White-acre, I will stand seized of Black-acre to the use of him and his heirs, and he doth infeoffe me accordingly; in this case the use of Black acre will rise to B, and he and his heirs shall have it according to the agreement. So if I agree with my Lessee for years, that if he pay me 100 l. within his term, that I will stand seized of the land to the use of him and his heirs, and he do pay me the 100 l. accordingly; in this case the use will rise, and he and his heirs shall have it according to the agreement. So if I covenant that my son shall marry the daughter of A, and A promise to give me a 100 l. for the marriage portion, and I covenant that if the same marriage do not take effect, I and my heirs will stand seized of the land to the use of A and his heirs until the 100 l. be paid; in this case a good use will rise of the land accordingly, if the marriage do not take effect; But in all these and such like cases, the covenant must be by Deed indented, and it must be inrolled; otherwise no uses will arise. And when the Deed is inrolled it shall take effect as from the beginning by relation to avoid all intervention estates and charges whatsoever: And in like manner it is if one for no cause, or for no consideration, as [because he is of his antient acquaintance, or because there hath been entire love or great familiarity between them, or because he hath been his chamber-fellow, school-fellow, or fellow-servant, or because he hath done him good service, or because he was his Master and taught him, or to the end that he may pay his Debts and Legacies and discharge his Funerals, or for divers good causes and considerations] if one for any of these or any such like cause and consideration, covenant with another that he will stand seized of his land to the use of that other and his heirs, or that he and his heirs shall have the land, &c. by this covenant whether it be inrolled or not, no use at all will rise. So if one covenant to stand seized to the use of I S (who is his Bastard son) and his heirs; no use will arise hereby: And yet perhaps upon such a Covenant as this, whereupon no use nor estate doth arise, an Action of Covenant may lie. But if one [in consideration of nature, kindred, blood, or marriage with ones self, or any of his blood, payment of debts, or for the like cause] or without any such express consideration at all, Cove-

Relation;

Covenant;

nant

nant to stand seized to the use of himself, his wife, children, brothers, sisters, or cousins, or their wives: these are good considerations, and the uses and estates thereupon thus raised and made, are good: And therefore if one covenant by his Deed without expression of any consideration to stand seized of his land to the use of himself for life, and after of his wife for life, and after of his child in Tail, or for life, and after of his brother in Tail, or for life, or in Fee, or in any such like manner; these uses will rise and the estates will be well made hereby accordingly. So if I agree with another, that if he marry my daughter, that from the time of the marriage, they shall have my land to them and their heirs; in this case, and by this agreement, if he do marry my daughter, they will have my land according to the agreement: So if I being about to marry with a woman, covenant with *I S*, to stand seized of my land to the use of my self for life, and after to the use of the woman I am to marry for her life, and after to the use of the heirs of my body begotten on her, these are good uses and estates that are made by this covenant: But here by the way, this difference must be observed where a man doth covenant in consideration of a marriage to be had, to stand seized to use, and the marriage doth not take effect, there no use shall arise: So also if the parties disagree at their age of consent: and so was it held in the Lord *Herberts* case: but where one doth covenant to make a Feoffment, or levy a fine to such uses, and the Feoffment is made, or fine levied accordingly, there notwithstanding the marriage doth not take effect, yet the use shall arise; for there he is in by the Fine or Feoffment, in which case there needs no consideration: And therefore if *A* covenant with *B*, that in consideration *C* is his kinsman, and in consideration of a marriage to be had between *C* and *E*, he will make a Feoffment and other assurances to the use of himself for life, the remainder to *C* and *E*, and the heirs of their two bodies, and after assurances are made accordingly by Fine or Feoffment, but they do not intermarry, but marry others; in this case notwithstanding *E* shall have a Moyerety of the land. So if I covenant (in consideration of the love I bear to my wife) to stand seized to the use of her and her heirs of my body upon her begotten, and after to the use of my brother; hereby the use will rise to my brother also, albeit he be not within the express consideration: So if one covenant with his two sons for the love he doth bear to them, to stand seized of his land to the use of himself for life, and after of his wife for life, and after of his two sons in tail one after another: in this case the consideration is sufficient to raise the use to the husband and wife also. So if one (in consideration of the love he doth bear to his brother) doth covenant to stand seized

Plow. 306.
B o. Feoff.
ment all
uses 541.

Curia Trin.
10. Car B.
R. Hookins
case.

Co. 7. 46.
11. 24.
Dyer 374.

Plow. 307.

seized to the use of his brother, and the wife of his brother for life, or in tail; in this case the consideration is sufficient to raise the uses to them both. So if I covenant (in consideration of the marriage of my son with the daughter of another) to stand seized to the use of my self for life, and after of my son and his wife in Tail; these are good uses and will rise accordingly. If I covenant with I S to stand seized to the use of him, his Executors, &c. (he being none of my kinred) for twenty years and after to the use of my son in Tail; in this case, the use will not rise to I S, but it will rise to my son well enough. For albeit the consideration of money given by one, may be a consideration to all the estates; yet the consideration of blood, &c. is singular and will raise the use of that onely to which it goeth: But if I covenant with B in consideration of the marriage of my son with the daughter of B to stand seized to the use of R (a stranger) for life, and after to the use of my son and his wife in Tail; in this case, the use shall rise to R. albeit he be a stranger, and that for the supportance of the remainder, which cannot be without a particular estate; and in al these and such like cases no inrolement of the Deed is necessary. If I (in consideration of 10 l. given to me by my son,) covenant with him to stand seized of land to the use of him and his heirs; in this case, no use will rise without inrolement by the implied consideration, because there is an expresse consideration, *Et expressum facit cessare tacitum*. And yet if I covenant, that in consideration that I S is my son, and hath paid me 10 l. that I will stand seized of land to the use of him and his heirs; in this case, the use will arise without inrolement. And if I covenant in consideration of 100 l. and of a marriage, to stand seized to the use of my self for life and after of my son in Tail; hereby the use is raised, and the possession charged without inrolement. So also where a Feoffment is made, Fine levied, or recovery suffered, and no use declared thereupon and the same is without any consideration of Fine or Rent; by this the use is not changed, for it doth result to the Feoffor, Conusor, and Recoveree, and he hath the estate as he had it before; but if in these and such like cases, there be but a penny or a penny worth of consideration given, or any rent reserved upon the Feoffment; the use will rise well enough to the Feoffee, &c. And if any Tenure be created, as where a gift in Tail, Lease for life or years is made; in these cases, albeit there be no consideration given, yet the use will rise well enough to the Donee or Lessee and especially, if any rent be reserved, for that is a kinde of consideration: But if a Lessee for years grant over his term to another without any consideration at all, it seems by this no use at all will rise to the Grantee, and therefore that the Grantee shall hold still to the

Inrolement.

Pl w. 307.
Dy or 174.

Co. 11. 84.
25. 7. 40.

Maurels
case. 3. 32.
B. R. Bro.
Feoffment-
al use 15.
Plow. Man
rels case. 4

Co. 1. 24.
Doct. 8.
St. 97. 99.
101.

Seventhly, in respect of the manner and frame of the words used in the raising of uses, and what manner of uses may be made or not,

the use of the Grantor, *sed Quere*. The seventh thing whereunto respect is to be had, is the manner and form of words used in the making and raising of uses, wherein there is much regard to the mind and intention of parties: For if one Covenant in consideration of 20 l. paid him by I S, to stand seized of Land to the use of I S and his heirs: or if one covenant that I S and his heirs shall have his Land; if this Deed be Inrolled, this is a good bargain and sale to raise the use, and will do it as well as when it is made by the words [*Bargain and sell*.] So if one for good consideration by words of Demise and Grant, make a Lease of his Land for a term of years;

Co. 8. 94.

Corr. in Sir Rowland Haywards case. Wards versus Lamberg, Co. B. Pasche 37. Eliz.

Inrolment.

hereby the use will rise to the Lessee as well as if the Lease were made by the words, *Bargain and sell, Et sic de similibus*. And yet if one by words of *Bargain and sell*, convey his Land to his son, no use will rise by this, except there be money paid, and the Deed be inrolled. And if one in consideration of money grant his land to his son, or any other by the word [*Enfeoff*.] no use will rise by this, unless Livery of Seisin be made thereupon; because the intent of the parties in these cases doth appear to be to pass it in another manner: And if in the last case Livery of seisin be made, then the use shall be guided by Law, that is, if nothing be given, it shall be to the use of the Feoffee, and not amount to a limitation of use to the son - If one covenant with his son, that his Land shall remain, or that his Land shall descend to him; this is a good covenant to raise the use according to the limitation. And yet if one covenant with his son upon his marriage, that his Land shall remain, revert, or descend to his son in Fee, or in Fee-Tail; by this no use will be raised, because it is so uncertain; but perhaps this may amount to a Covenant, whereupon the son may have an Action of Covenant. If I covenant for me and my heirs, that I and my heirs and all others that are seized, shall be thereof seized to the use of &c. This is a good Covenant to raise the use, albeit it be in words of the future Tense. If I covenant with my eldest son and strangers, to convey my Land to the same strangers to the use of my self for life, and after of my son in Tail, &c. and I grant by the Deed, that the said persons seized of the said Land, shall be from thence seized to the said uses, and none other use, and no other conveyance is made: it seems this is sufficient to raise the use: And yet if I be seized of Land in Fee, and Covenant with I S, that A B and C D and their heirs, shall stand and be seized of this Land to the use of &c. it seems, this is not a good Covenant to raise the uses. If a Feoffment or other conveyance be made to the use of the Feoffor and the heirs of his body, on the body of M the wife of S T, and for default of such issue, to the use of him and the heirs of his body of S the now wife of W K and for default of such issue, then to the use and performance of his

Resolved in Stiles case 37 Eli.

21 H 7. 18. Plow. 308. 301. Bro. Feoffment. all use 16.

Covenant.

Dyer 174.

Co. 1. 130.

his last Will for 10 years immediately after his death, and after the Term ended, to the use of the Feoffee and their Heirs during the life of *H* (eldest son of the Feoffor) and after his death to the use of the first issue male of the body of the Feoffor lawfully begotten, and the Heirs of the body of such first issue male, and for default of such first issue male to the second issue male, &c. in the same manner; these are good limitations of uses. So if a use be limited to

Co. 1. 90.

I S for life without impeachment of waste, and after to the use of *B* and *C*, their Executors and Administrators for the Term of twenty years and after to the use of *C* and the heirs males of his body, &c. these are good uses. So if a use be limited after this manner,

Co. 6. 18.
Lit. Sec.
462. 463.

viz. to the use of a mans last Will and Testament; or to the use of such person or persons, and of such estate and estates as he shall limit, and appoint by his last Will and Testament; or to the use of such person or persons, or to such uses and purposes as he shall by any writing under his hand and seal declare and appoint; these are good limitations. If I covenant with another in consideration of

Co. 1. 176.

blood, &c. that I will stand seized of my land to the use of such of my sons, or such of my cousins, as the Covenantee shall name; in this case, after a nomination made, the use will rise well enough. But if I (for and in consideration of 10 l. or the like good consideration) covenant to stand seized of land to the use of such persons as the Covenantee shall name; in this case, albeit the Covenantee do nominate some of my cousins, or blood, yet no use will rise by this for the incertainty of it. If a Feoffment or other conveyance be to the use of *I S* and his Heirs, provided that if the Feoffor pay 10 l. at such a day, that then it shall be to the use of the Feoffor and his Heirs; this is a good limitation, and the use will rise accordingly. A use may be limited to a woman *durante viduitate sua*, and this is good.

Incertainy.

Co. 4. 3.

If a man be seized of two Manors, and covenant to stand seized of the same to the uses following, *viz.* of the one to the use of the Covenantor for his life, and after to the use of his wife for life, and after to the use of his eldest son in Tail, &c. And for the other Manor, to the use of his second son in Tail, &c. these are good limitations, and the uses will rise accordingly.

Co. 2. 69.
70.

If a man seized of land in Fee agree with another, that a Fine shall be levied of it, and that the same shall be to the uses following, *viz.* that *I S* (the Conusor) shall have one yearly Rent of 50 l. during his life to be issuing out of the same land, and as touching the land charged with the Rent &c. to the use of *I D* (the Consee) until default of payment of the said yearly Rent, and then to the use of *I S* and his Heirs for ever; this is a good limitation and the use will rise accordingly, *Ex sic de similibus*.

Co. 20. 78.

If a Feoffment be made by *I S* to the uses in certain Indentures

Tripartite of the same date, and therein is declared that it shall be to the use of A for life, without impeachment of waste, and after to the use of such Farmers, or Tenants to whom he shall demise any part of the premises for life, or lives, or for any Term of years, as in any such demise shall be limited and appointed, and after to the use of the performance of the last Will of the said L, and to the use of such person or persons severally to whom the said L by his last Will and Testament shall appoint any estate, and after to the use of, &c. these are good uses, and the estates shall rise accordingly.

A use may be limited upon condition, and the condition may be annexed to one of the uses, and not unto another. Co. 4. 24.

If lands be conveyed to I S and the Heirs of his body, to the use of I S and his heirs, or to the use of a stranger and his Heirs; this use will not rise in this manner. And yet if lands be conveyed to I S, and his heirs, to the use of him and the heirs males of his body, and after to the use of a stranger and his Heirs; it seems this is a good limitation. Co. super Lit. 19.

If one grant lands by Deed to husband and wife, To have and to hold to the use of the husband and wife, and of the Heirs of their two bodies; this is a good estate Tail by this limitation, albeit he do not say *Habendum* to them and their Heirs, &c. but *Habendum* to their uses; but otherwise it were if the use were limited to a stranger in this manner. Hil. 6. Car. B. R. Ad-judge.

If lands be conveyed by I S to I D, to the use of I S, or to the use of his wife for life, or to the use of any other for life, the remainder to another in Tail or for life, the remainder to a third, his Executors, &c. for six months, and after the six months ended, to the use of a fourth and his heirs; these are good limitations, and the estates will rise accordingly. Dyer 314.

If a use be limited to the Conusee of a Fine, or a Recoveror in a Recovery until he make a Lease for forty years, and after to the use of the Recoverees or Conusors and their Heirs; this is a good limitation and the use will rise accordingly. Dyer 290.

Contingent uses, or uses *in poff*, may be created as well as uses *in esse*; and therefore if lands be conveyed to the use of a man and the wife he shall afterwards marry, or to the use of his first, second, or third wife; or to the use of I S for life, and after to the use of the right Heirs of I D, and I D is then living; or to the use of I S for life, and after to the use of him that shall be his first Heir male, and the Heirs of the body of such Heir male, &c. all these and such like, are good uses; but they are uses at the Common-Law still, and are not executed by the Statute until they come *in esse*. Co. 1. in Chudleighs case. 155.

Rightly, in respect of the nature and quality of the use.

The last thing whereunto respect is to be had, is the nature and quality of the use: And herein it is to be known, that a man may

at.

Co. 1. 26.
8. 13. 4.
113.

at this day by act executed in his life time, or by his last Will and Testament at his death, give his Lands, Tenements or Hereditaments to any person or persons not corporate, and their Heirs, for uses, Charitable any religious, charitable or civil use, as well as for any private use: And therefore a man may so dispose of his Lands for the finding of a Preacher, erecting or maintenance of a School, relief and comfort of maimed Souldiers, sustenance of poor people, reparations of Churches, High-ways, Bridges, discharging of the poor Inhabitants of a Village of the common Charges to make a stock for poor Laborers in Husbandry, and poor Apprentices, and for the marriage of poor Virgins, or other such like uses, and these uses are not prohibited by any Statute: And it is good policy upon every such Feoffment or estate to reserve to the Feoffor: and his Heirs some small rent, or to set down some small consideration: But these Uses are not such Uses as are executed by the Statute of Uses, neither are they to be resembled to the Uses aforesaid; for in this case, if there be any misemployment of the Lands or breach of the trust by the parties trusted, redress is to be had by the Lord Chancellor, or Lord Keeper by a special course of proceeding: For which, see the Statutes of 39 Eliz. Chap. 6. 43 Eliz. Chap. 9.

Stat. 15 R.
3. ch. 6.
17 H. 8. c. 1.
2 Ed. 6. c. 14.

7 Jac. Chap. 3. But if any man have heretofore given, or heretofore shall give any Lands, Tenements or Hereditaments by act executed in his life, or by his last Will at his death to any person singular, or Corporate, in Fee simple, Fee tail for life, or years, to the intent or upon condition to maintain any superstitious use, as to finde a Chaplain, and have the service of a Priest to say Mass, or to have a Priest or other man to pray for the soul of any dead man in such a Church or other place, or to have or maintain perpetual Obites, Lamps or Torches, &c. to be used at certain times to help to save the souls of men out of the supposed Purgatory, all these and such like Uses are void, and the Lands that are so given to such superstitious uses, are to be forfeited, and given to the King, and he shall have them; and yet if so that there be any charitable use intermixed with the superstitious use, and they may be distinguished, the King shall have onely so much as is given to the superstitious use, and not that which is given to the charitable use also: For which, See *Adams and Lamberts Case* at large, Co. 4. 1. 4.

Superstitious
uses.

Co. 1. 275.
176.
Dier. 169.

As touching the Declaration of Uses, in the Manifestation or Agreement of the parties, to what uses and intents the Assurance made shall be, these things are to be known: That Uses may be declared or averred on a Fine, Feoffment, or Recovery of Land, but on a Bargain and Sale of Land, no use may be declared or averred but what the Law doth make: And upon a covenant of Uses, no other use may be declared or averred, but what is contained

5. Declaration
of Uses: And
where a use of
Land may be
declared upon
any Assurance,
and what shall
be said a sufficient
declaration of such a
use, or not.

within the Deed. 2. Every one may declare and dispose the use of land according to the Estate that he hath in the land; for the declaration and disposition of the use doth ensue the ownership of the land *sicut umbra sequitur corpus*. And at this day the use doth draw the land to it, as the body or principal the shadow or accessory: And therefore the owner of the Land, or be from whom the land doth move, ought to limit and declare the use of the land, as if the Husband and Wife levy a Fine of the Land, whereof he is seised in the right of his wife, the Husband alone may declare the use of this Fine, and this Declaration shall binde the Wife, albeit her assent to the limitation of the uses do not appear, if her dissent doth not appear; but in this case it is most proper to have a Declaration of the uses by the Husband and Wife both; for she alone, because she is *sub potestate viri*, cannot alone declare or limit any use; neither can the Husband alone limit any use against her good will, because he hath not the estate of the Land: And therefore if *A* and *B* his wife be seised of land in the right of his wife, and she without the consent of her husband covenant by Indenture with *C* and *D*. 14 *Marii* 14 *Eliz.* that a Fine shall be levied of this land, and that it shall be to the use of her self for life without impeachment of waste, and after to the Conusees for their lives; to the intent that they shall suffer 1 *S* to take the profits for his life for divers Remainders over; and afterwards and before the Fine levied, the husband alone by another Indenture 31 *February* 22 *Eliz.* (wherein the wife is named a party) without the consent of his wife, doth agree that a Fine shall be levied to the use of him and his wife, and after to the uses limited by the wives Indenture, and after the Fine is levied accordingly; in this case, albeit the variance be in one particular onely, and the limitation in all the rest of the uses and estates do agree, yet all the same limitations by both Indentures are void, and the use, upon the conveyance is left to construction of law and therefore shall be to the wife and her Heirs for ever: And yet if the Husband and Wife agree in the limitation of the Uses for part of the land, and differ in the rest, the limitations for so much as they agree in are good, and void for the residue: And in these cases where the Declaration is good, the Wife and her Heirs shall be bound by it. So if two Joynt-Tenants are, and they and two others having several estates joyn in a Fine, and one of them declare the use in one manner, and the other doth declare the use in another manner, this Declaration is good for either of their parts; for the Declaration shall be governed according to their Estates. And if an Infant, or a man *de non sane memoria* doth declare the use of a Fine levied by him, this Declaration is good, and shall binde him so long as the Fine shall continue in his force. 3. This Declaration of Uses may be made either

Husband and
Wife.

Joynt-tenants

Infant.

either by Deed indented (which is the most usual and safe way,) or by Deed poll; as where the parties do by such a writing agree that an Assurance passed, or to be passed, shall be to such and such uses, as that a Fine shall be levied by such a time, and that it shall be to the use of one for life, another in Tail, another in Fee. Or it may be made by a verbal agreement without any writing at all; as where an agreement is so had, and made between two or more, that a Fine, or Recovery shall be had, and it shall be to such and such uses, and the same is had accordingly; in this case, this is a sufficient declaration being proved; but it is not safe in these cases to depend upon slipper memory. 4. This declaration by word or writing, may be made before, at, or after the time of making the Assurance: And therefore one may covenant or agree that I. S. shall recover against him, or that he will levy a Fine, or make a Feoffment to I. S. of such land, and that the same shall be to the use of &c. And if one make a Feoffment, he may declare the uses of it at the same time, and that within the same, or in another Deed at his pleasure: And if the Assurance be past, and no declaration of uses had before, or at the time of passing it, a declaration may be subsequent, viz. That the same Assurance was and shall be, and the Recoverors, &c. shall stand and be seised to such and such uses; for an Indenture subsequent may direct and declare the uses of a Fine or Recovery precedent. But herein these diversities are to be observed; when precedent Indentures are made to direct the uses of a subsequent Assurance, and after the Assurance is made accordingly, there no Averment shall be taken by word, that the same Assurance was to other uses then are declared by the Indenture: But against an Indenture subsequent, declaring the uses of an Assurance precedent, an Averment may be taken, that there were other uses expressed and limited, before or at the time of the Assurance, then are contained in the Indenture. If a precedent Indenture be made to direct the uses of a subsequent Assurance, when the Assurance comes, the Land is bound, and the Conusor or Recoverer cannot by any act of his, after Recovery had, charge or avoid it; but if the declaration be subsequent, if in the interim, between the Assurance had, and the declaration of the uses, the Conusor or Recoverer sell, give, or charge the land to others; this subsequent declaration will not subvert the mean Estates, charges or interests, unless it can be otherwise proved, that by a certain and compleat agreement of the parties, the Assurance was had and made to these uses. 5. When the agreement for the limitation of uses is precedent, whether it be by writing or word, it is but directory, and doth not binde the estate untill the same Assurance be afterwards had, and therefore by a new agreement or declaration made in the same manner as the

Averment.

Co. 2. 65.
70. 6. 27.
63.
Dier 290.
Co. 7. 40.
Co. 9. 8.
Dier 126.

former, viz. in writing, if the former be so, and between the same parties either before, or at the time of the same assurance passed, new uses may be made and the former uses changed, but when the same assurance is pursued accordingly, & no intervening alteration is made, it shall be expounded to be to the same uses, and shall bind the parties, and no naked averment shall be received of any latter or other agreement contrary to the Indentures. 6 The declaration of the uses must be certain and especially in three things: In the person to whom, in the lands &c. of which, and in the estates by which the uses are declared, and if there want certainty in either of these, the declaration is not good, and it must be complete of it self without any reference to Indentures, or other writings to be made afterward, for then it is but an imperfect communication, and no complete declaration. 7 Where an Indenture precedent is to limit the uses of a subsequent Fine or Recovery, and it is not pursued in some circumstance of time, person, quantity or the like: yet if no other new mean agreement may be proved, the Assurance shall be in Judgement of Law to the uses contained in the same Indenture, but if the variance be in these particulars, and the form of the Indenture be not pursued, there an averment without writing may be taken, that the Fine or other Assurance was to other uses then are contained in the Indenture; and if none such can be made, then it is left to construction of Law. And therefore if *A* be seized of divers Manors in Fee and by his Indenture dated 10 *Martii* 21 *Eliz.* doth covenant with *B* and *C*, that he before the end of Trinity Term next will by Fine or other conveyance assure one of these Manors to them, and that the same Assurance shall be to the use of *A* and *E* his wife, and of the heirs of *A*, and the 28th day the Deed is inrolled, and the 29th day of the same moneth, he doth by another Indenture covenant with the same *C* and *D* to convey all the same Manors to the same *C* and *D* before the Annuntiation next, and that the same Assurance shall be to the use of *A*, and the heirs males of his body, and for default of such issue, to the use of divers others in remainder, and by this Indenture doth covenant, that if he shall not sufficiently convey this land by the day, that he will stand seized to the same use, &c. and no Fine is levied by the end of Trinity Term, but 17 *Septemb.* following, a note of a Fine is acknowledged to *B* and *C*, and the heirs of *B*, of the land within the first Indenture, and the 18th of the same moneth, another note of a Fine is acknowledged to *C*, and *D*, of the same, and other land in the last Indenture, and both these Fines are entered in *Officiis Mich.* following; in this case these Fines cannot be directed and declared by both Indentures, and therefore it seems these declarations are void.

6s Averment of uses; and where a use of land may be averred upon any assurance; And what shall be said a sufficient averment, or not,

As touching Averment of Uses, i. e. the proof of Uses by witnesses, these things are to be known, that where any use is expressed upon a Charter of Feoffment, no other use *contra* or *præter* the use which

Co. 9. 8.
5. 20. 25.
Doct. & St.
95.
Co. 2. 57.

which is expressed shall be admitted. But in cases of Fines and Recoveries wherein no uses are expressed, other uses then what Law-construction will make may be shewed and proved to be agreed upon, and the same assurances shall be to such uses as by proof shall be made to appear to be the intent of the parties: As if a man and his wife sell her land for money, and after levy a Fine to the Vendee and his Heirs; in this case it may be averred it was for money, and this shall carry the use to the Vendee without any declaration of use, which otherwise would result to the woman and her Heirs: And yet if a Fine be with a Grant and Render, no Averment to prove it to be to other uses then what are contained in the Fine shall be received. And where the uses of a conveyance be declared by Indenture before, or at the time of the same conveyance, no averment shall be received of any other uses then what are contained in the Indenture: But if the Indenture of Declaration be subsequent, there an Averment lieth and shall be received that there were other uses agreed upon at or before the time of conveyance made. And where an agreement is made to levy a Fine, or suffer a Recovery, before, or at a time certain, and that it shall be of such and such lands, and to such and such persons; and after it falleth out, the Fine or Recovery is not had by that time, or not of the same land, or not between the same persons; in these cases an averment may be had of other uses, and of another agreement.

Where the uses of an Assurance are certainly agreed upon and declared between the parties thereunto, there regularly it shall be to such uses as are declared and agreed upon, and to none others. But if a Conveyance be made of Land by Fine, Feoffment, or Recovery, and no uses thereof declared and agreed upon, the Law will limit and appoint the use according to equity and conscience. And therefore if a man levy a Fine, and make a Feoffment, or suffer a Recovery of land without any consideration; the Law will adjudge the use to be in the Feoffor, Conusor, and Recoverer, who doth part with the land: And so if a man make a Feoffment to the intent to perform his last Will; or to the use of his last Will, or to such persons as he shall limit by his last Will; in all these cases the use shall be in the Feoffor and his Heirs while he doth live to dispose at his pleasure. And so if one make a Feoffment of Land to *J S* and his Heirs, to the use of *W S* for twenty years, and limit the use no further; in this case, the residue of the use after the twenty years shall be to the Feoffor and his Heirs: But if in these cases there be any consideration of money or the like, though never so little given, or any Rent reserved upon the Feoffment, the Law will adjudge the use in the Feoffee, Conusee or Recoveror: And yet in that case also if other uses be expressed upon the Deed, it seems it shall go to the uses expressed, as if *A* for 20 l. paid by

7. To what use an assurance of land shall be by construction of Law, And how the limitation of the uses of land by a Deed shall be construed.

Doct. & St.
95.
Perk. sect.
531.
Co. 1. 24.
Dier. 8.
Crompt.
Jur. 62.
Co. super
Lit. 271.

Bakers
case. Co.
2. Hil. 97
Elix.

Doct. & St.
95.

B.

B, enfeoff *B* and his Heirs, to the use of *C* and his Heirs. If the Husband and Wife levy a Fine of the Wives land, without consideration and without any declaration of use, the Law will adjudge this to be to the use of the Wife and her Heirs; but if they sell her land for money, and after levy a Fine thereof to the Vendee, this shall be to the use of the Vendee and his Heirs. And if a man be seised of land of the part of his Mother, and without any consideration make a Feoffment in Fee of it; this shall be said to be to his use in the same nature he had it before. So if two Joynt-tenants be of land, the one in Fee-simple, and the other but for life, and they without any consideration levy a Fine of it, and make no declaration of use; the use shall be to them of the same estate as they had before in the land. So if *A* tenant for life of land, and *B* in reversion or remainder, levy a Fine of this land, generally, this shall be to the use of *A* for life and to the use of *B* in Fee afterwards as it was before. So if *A* be seized in Fee of an Acre of ground, and he and *B* joyn together and levy a Fine of it to another without any consideration, this shall be to the use of *A* and his Heirs onely.

If one make a gift in Tail, or Lease for life, or years, albeit it be without any consideration of Fine, or Rent, yet the Law will adjudge the use in the Donee or Lessee, and not in the Donor or Lessor.

If one at this day by Deed indented bargain and sell his land to another for money, and doth limit no estate but the Deed is *Habendum* to him onely, and not *Habendum* to him and his Heirs, or to him and the heirs of his body, or to him for life, howsoever in this case before the Statute of uses was made, it was otherwise, yet now the common received opinion is that by this there doth pass onely an estate for life, and not a Fee-simple.

If a Feoffment be made to *IS* and his heirs to the use of *ID* without any more words; by this limitation *ID* hath onely an estate for life: So if a Feoffment be made to *IS* and his heirs to the use of *ID* for ever, without saying [and his Heirs] hereby *ID* hath onely an estate for life: And so of other uses the construction shall be according to the rules of Law.

If a use be limited to *IS* and his Heirs; untill *A* shall come from beyond the Sea, and attain his full age or die, in this case if he come from beyond Sea, attain his full age, or die, the use shall cease.

If one covenant to stand seised to the use of *A* his eldest son and the Heirs males of his body, and after to the use of *B* his second son in Tail in the same maner, or according to the limitation to *A*; by this *B* hath an estate Tail to him and the Heirs males of his body.

Co. super
Lit. 28.

If a Feoffment in Fee be made to the use of a man and his Wife for their lives, and after to the use of their next issue male to be begotten, in Tail, and after to the use of the Husband and Wife, and of the Heirs of their two bodies begotten (they having no issue male then;) by this the Husband and Wife are Tenants in special Tail executed; and after they have issue male, they are Tenants for life, the remainder to the son in Tail, the remainder to them in special Tail.

Dier 300.

If one make a Feoffment to the use of himself for life, and after his decease to the use of *Alice* whom he doth intend to marry, until the issue he shall beget of her, shall be of the age of One and twenty years, and after the issue cometh to that age, then to the use of the Wife during her widowhood, and the Husband die without issue, by this the wife shall have an Estate at least during her widowhood.

Co. 1.

If I covenant with *B* that in consideration he will marry my daughter, that from the time of the marriage I will stand seised to the use of my self for life, and after to the use of *C* a stranger and the Heirs males of his body, and after to the use of *B* and my daughter and the Heirs of their two bodies; in this case albeit the use limited to *C* the stranger be void, yet it seems *B* and my daughter shall not have the Land till the death of *C* without issue, but that my Heirs shall have it till that time.

Co. 1. 255.

If I covenant with *B* to stand seised to the use of my self for life, and after my death to the use of *C* a stranger for the term of twenty years, and after the end of the term to the use of my son in Tail; in this case the use limited to *C* is void, and my son after my death shall have the land: But if the words of the covenant be [and after the end of twenty years] instead of [and after the end of the term] my son shall not have the land until the twenty years be expired. See more in Exposition of Deeds, chap. 5.

Co. 1.
Chudleighs
case.

All such uses as are not within, nor executed by the Statute of 27 H. 8. but remain at the Common-Law, may be destroyed, discontinued, or suspended as uses before the Statute might have been. And therefore contingent uses may be extinguished or suspended at this day. As if a man seised of Land in Fee have three sons *A. B. and C.* and he make a Feoffment of his land to divers Feoffees to the use of them and their Heirs during the life of *A* and after to the use of the first son that *A* shall beget and the Heirs males of the body of such first son; or if a Feoffment be made to the use of a man, and the wife that he shall marry, or the like; if in these cases the Feoffees make a Feoffment over before the contingent uses happen to be in esse, as before *A* have any son, or the man take a wife, &c. albeit it be to one that have notice of these uses, yet the uses are destroyed for ever, and the Feoffees cannot enter and revive

8. Where and how Uses of Land may be extinguished and destroyed or suspended or not; And where the ancient Uses shall be revived by the entry of the Feoffees, or not.

th. m.

then contrary to their own Feoffment: And if in these cases the Feoffees before the contingent remainder vest be dissolved, hereby the Uses are suspended; but then by the reentry of the Feoffees the antient Uses will be revived again: And therefore if the Feoffees release to the Disfeisor and so bar themselves of their entry, the Uses are extinguished and shall not be revived, and the party grieved hath no remedy but in Chancery against the Feoffees for breach of trust. And if the Feoffees in the first case before die, before *A* have any son born, the contingent remainder is gone: As where a Feoffment is made to the use of the Feoffor for life, and after to the use of the right Heirs of *I S* in Fee, and the Feoffor die before *I S*, in this case the remainder is gone, for a remainder cannot be without a particular estate no more of a use than of an estate made in possession: and such a remainder must vest during the particular estate, or at least *eo instanti* when the particular estate doth end.

If a Feoffment be made to the use of *I S* and the wife he shall afterwards marry, and of the heirs males of their bodies, and *I S* make a Feoffment of this Land to another before he take a wife, hereby the contingent remainder is destroyed. Co. 1. 136.

If *A* enfeoff *B* and his Heirs, to the use of *C* and *D* his Wife, and the Heirs of the survivor of them, and *C* makes a Feoffment to *E* and dieth, this Feoffment doth destroy the contingent remainder. Hill. 2. Car. Scaccar. adjudged.

When the Estate out of which the Uses do arise is gone, the Uses are gone also: As if a Lease be made to *A* for his life, to the use of *B* for his life, and *A* dye, hereby the estate of *B* is gone. Dier 186.

Also uses of Lands may be gone by Revocation, whereof see in the next part.

9. Where a power to revoke Uses of Land shall be good, and how they shall be taken; and what Revocation by reason of such power shall be good, and what not.

Provisors and Powers of revocation of uses of Lands are very frequent in voluntary conveyances (whether by Feoffment or otherwise) that pass Land by way of raising of uses, and are executed by the Statute of 27 H 8. and the inheritances of many depend thereupon. As if a man seised of Land in Fee have divers sons, and he covenant to stand seised of that Land to the use of himself for life, and after of his eldest son in tail, and for want of such issue to the use of his second son in tail, &c. with a Proviso that it shall be lawful for him at any time during his life to revoke any of the said uses, and to limit and appoint other uses, &c. Or if *A* by Indenture between him and *B* his Heir apparent an Infant, covenant with *B* for the advancement of his blood, &c. to stand seised to the use of himself for life, and after to the use of his said Heir apparent and the Heirs males of his body, and after to the use of his right Heirs, provided that if *A* by himself or any other during his life shall deliver or offer to *B* a Ring of gold to the intent to

Co. super Lit. 257.
7. 11. 32.
10. 143.
1. 130. 77.
167.
Dier 379.

make

make void all the same uses, that then the said uses shall be void, and he may limit new uses: Or if A by Indenture covenant with B to stand seized to the use of himself and his wife and his daughter for their lives, and after, &c. provided that if the said A during his life and after the debts mentioned in the Schedule annexed to the Indenture shall be paid, shall be disposed to determine, disanul, change, alter, or enlarge, diminish or make void the uses, or estates, or any of them, of the premises or any part thereof, and by writing indented under his Hand and Seal, subscribed in the presence of three witnesses shall declare his minde to be so, that then the same uses shall be void; all these and such like Provisoes being coupled with a use are allowed to be good and not repugnant to the former estates. But in case of such a Feoffment or other Conveyance whereby the Feoffee or Grantee is in by the Common-Law, as where A doth Enfeoff B and his heirs to the use of B and his Heirs, it is said such a Proviso is meerly repugnant and void. And as touching these Provisoes or Revocations, these things are to be known; 1. These Revocations are favorably interpreted, because many mens Inheritances depend upon it: And therefore he that hath his power may revoke part of the uses at one time, and part at another time; and the revocation of the old, may be made by the making of new uses without any express revocation; And by the same conveyance whereby the old use be revoked; the new use may be created and limited, and then the former uses doe cease *ipso facto* by this revocation without any entry or claim; As if one covenant do stand seized to the use of himself and his wife for their lives, and after to the use of A his daughter for life, and after to the use of B his daughter in Tail, &c. provided that if he shall be minded, &c. he may by writing, &c. make void the same uses, and declare the uses to others, and he doth make void the use to his wife at one time and no more, and after by a Deed doth limit and appoint new uses of the whole by a new covenant to stand seized to other uses; these are good revocations; for their needs no real and express revocation of former uses, but the creating of new uses is in Law an actual revocation of the old uses; as the making of a latter is *ipso facto* a revocation of a former Will. 2. The Proviso must for the substance of it be pursued in the revocation, and all incident circumstances thereof must be observed, as sealing, subscription of names, witnesses, and the like; otherwise the revocation will not be good. And therefore if the Proviso be, that if the Covenantor shall be minded to revoke, and shall declare his minde by writing indented under his Hand and Seal, delivered before three witnesses, the uses shall be void; in this case a revocation by word without writing, or by a writing and not indented, or by writing indented and not under Hand and Seal, or under Hand and Seal, and be-

fore:

fore two witnesses onely, is not good. And yet if a proviso be that if the Covenantor shall at any time during his life by writing under his hand and Seal delivered before two witnesses revoke the same, &c. the old uses shall be void, and the Covenantor by his last Will and Testament in writing under his hand and Seal before two witnesses doth give the land to another, and make no express revocation of the former uses: this is a good revocation in Law. If the Proviso be that if the Covenantor be minded at any time during his life to revoke the same uses, &c. and shall pay or tender to A B 20s in such a place; in this case tender of this 20s in that place at any time is not good, unless he happen to meet with A B at the place, for then tender at any time is good; but otherwise the Covenantor must give notice to A B what time he will tender the 20s in that place, otherwise the revocation is not good. If one be to marry his daughter to the son of another man, and they do mutually covenant to stand seized of their lands to the uses of their son and daughter with Proviso to revoke the use with the consent of the mothers, if they or either of them be the living; and one of them dye, in this case a revocation by the consent of the surviving mother is sufficient. 3. When the Covenantor doth make void such uses by virtue of such a revocation, he is seized again of the land in Fee simple, as he was at first without any entry or claim. 4. This power of revocation, whether it be present, as those before and most are, or future, as when they are upon contingent, as if the Covenantor over-live I S or the like, when it is reserved to the party himself that made the uses, may by his Fine, or Feoffment be utterly extinguished; As if he make a Feoffment, or levy a Fine of the land whereunto the uses and Proviso are annexed; by this the proviso is extinct; And yet so as if he make a Feoffment, or levy a Fine of part of the land onely: this shall extinguish his power but to that part onely: But if the power be reserved to a stranger, it seems a Fine or Feoffment of him that made it, will not extinguish it. This power also when it is present may be extinguished by a Release made by him that hath the power, to any one that hath any Estate of Franktenement in the land in possession, reversion, or remainder; or it may be avoided by defeasance whether it be present or future.

Release.

Defeasance.

10 Other
Trusts and
Confidences
of lands and
of chattels real

al and personal. The nature of such Trusts, the duty of them that are trusted, and the remedy to be had against them for breach of their Trust.

Trin. 18
Jac. Co. B.
Tibbet &
Lees, case

Coo. 8. 921

Trin. 18
J. B. R.
Savil &
Sterlings
case.

C. 1. 1. 117.
113. 113.
super Litt.
237.

Crompt Jur.
48 50. 58.
54. Dyer
160 Fitz.
Acompt
222.

it may be conveyed to them afterwards: or if a man deliver money to his friend to buy land for him that doth deliver the money in his own name; or if a man enfeoffe his friend and his heirs of land, to the intent that he shall alien the land to whom *I S* shall appoint; or if land be conveyed to me in Mortgage and I pay all the money, but I to prevent the joyature of my wife, or for some such like cause name a friend joynt purchasor with me, and so the conveyance is made to us both; if in any of these cases, or in any other such like case the friend trusted prove false, and do not perform the trust, but turn the profits of the land to their own use, or refuse to settle it according to the trust, or the like, the party grieved must have his remedy in Chancery, for these are not Trusts or Uses within the Statute, nor such for which there is any remedy at the Common-Law; and in that case where the Land is settled to the intent that the friends trusted shall settle it where *I S* shall appoint, if *I S* do not appoint how it shall be settled, it seems the Feoffees shall have it to their own use.

And if a man give or grant his Goods or Chattels, as Leases for years, or the like, to friends in trust to the use of himself for life, and after to perform his Will, or the like; these are such uses and trusts as are not within the Statute of uses, and for the breach of which there is no remedy at the Common-Law but in Chancery only. So if an Obligation or Statute be made to *A B* to the use of *C D*; this is a trust of the same nature; and if *A B* release the Obligation without the consent of *C D*, or get the money into his own hands, *C D* shall have relief in Chancery; And in all these cases and such like cases, the general rules by which uses were governed at the Common-Law are still in force and to take place as those by which uses and trusts are now for the most part governed. As First, If there be any cause to sue for or about the

Lands or Goods wherewith the parties are trusted, as if they deny or delay to perform the trust they must be compelled thereunto by Suit in Chancery. Secondly, The *Cestuy que use*, or party for whom the trust is, cannot of himself dispose of the Lands or Goods for the property and interest in Law is in the Trustees; and if it be an Obligation or Statute that is made to the use of another, *Cestuy que use* cannot release it, but the Trustee must release it. Thirdly, If the party trusted so with Lands, Goods or Chattels, give, grant, or sell the same Lands Goods or Chattels, to one that hath knowledge of the same uses or trusts (as it always presumed he hath, where the trusts are expressed upon the same Deed, by which the Lands, Goods or Chattels are given or granted), or if the things so given or granted, be granted upon the the same trusts, or to the same uses, or without any consideration at all, in these

cases

Crom. Jur.
65. Dyer
369. Bro.
Feoffment
all use & Co.
Cromp.

Jur. 65. 45.
11 Ed. 4. 2.
9 Ed. 4. 29.

7 Ed. 4. 29.

Crom. Jur.
65. 65.
11 Ed. 4.
26 Ed. 4.
97.

cases he to whom the thing whereabout the trust is, shall have the same thing upon the same trust, and to the same use as he that did give or grant the same had it. But in case where no trust or use is expressed upon the Deed, the purchaser or buyer hath no notice or knowledge of the use or trust, and he gives a valuable consideration for the thing, there for the most part the sale is good, and the party grieved thereby hath no remedy but against the party first trusted in Chancery; and the purchaser shall have and enjoy the thing so bought to his own use for ever; but he that is the party trusted, will be forced in Chancery to make the party grieved an amends in damages for this breach of trust; And if there be any practise, packing, or combination between the buyer and the seller in the matter, there perhaps the Suit may hold against them both, and the buyer may be forced to restore the thing it self. And yet if *A* enter into a Statute to *B* and *C* to the use of *B*, and *A* having notice of this use doth get a release from *C*: in this case it seems *B* must have his whole remedy against *C*, and shall have no remedy against *A*. 4. If the Trustor or *Cestuy que use* in these cases commit Felony, &c. so that the thing, if he had the property of them were forfeit; in this case it seems that neither they nor their Heirs, Executors, &c. nor yet the Lord, &c. shall have them, but the Trustees shall keep them for ever. 5. If the *Cestuy que use* or Trustors dye and appoint how the same things shall be disposed of, the Trustees are bound to see it done; as if the Trustor appoint it shall pay his debts, or provide Legacies, the parties trusted must take care it be so employed, and in this case the Debtors and Legatees also may compell the Trustees in Chancery. 6. In all these cases regularly the thing whereof the trust is, is in equity at the disposing of him that is the *Cestuy que use*, unless he do otherwise appoint it, and if at his death he make no disposition thereof it shall go to his Heir, Executor, &c. 7. In all these cases the Trustees shall have their reasonable allowance in Chancery for whatsoever they have laid out about the land, &c. in Suits or otherwise for the profit of the Trustor. Out of all which may appear how dangerous it is for a man to meddle with any lands, goods, or chattels so conveyed or settled in trust, for the *Cestuy que use* or Trustors have no property in the thing, and therefore they cannot sell or give it, and the Trustee hath it but to anothers use; And it is not safe therefore to deal with either of them alone, nor yet indeed safe to deal at all in these cases, unless the buyer may have the consent, sale, and assurance, or the Release, &c. of the Trustors and Trustees

11 Ed. 4. 8.

Bro. Feof. mental use 14.

15 H. 7. 116. Crom. Jus. 34.

Dyer 49.

8 H. 7. 11.

7 Ed 6 14.
Fitz. Sub-
pena. 5.

steals altogether: And if there be any woman Covert, or Infant within the Trust, it is most of all dangerous. And if Goods or Chattels be given to, or to the use of a Feme Covert, or Infant, and certain friends are trusted therewith, if they do sell or give away these Goods or Chattels contrary to the Trust, they must be sure to answer it: If therefore they sell them, let them see that the money made thereof be beneficial, and be bestowed for the wife or children; for it seems it is not sufficient in this case, that the money made thereof be paid to them.

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